ONTARIO
LABOUR RELATIONS BOARD
REPORTS

March/April 2008

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A Bimonthly Series of Decisions from the Ontario Labour Relations Board

Cited [2008] OLRB REP. MARCH/APRIL

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CASES REPORTED

COURT PROCEEDINGS

SUBJECT INDEX

0421-07-R Patrick Poisson, Applicant v. The International Brotherhood of Electrical Workers, Local 586, Responding Party v. **2890275 Canada Inc. o/a ENER-TECH**, Intervenor

Bargaining Rights – Employer Initiation – Evidence – Termination – In an application seeking to terminate the bargaining rights of the union, the Board found that although there was very little direct evidence establishing that the employer initiated the application, the union was perfectly entitled to meet its onus through circumstantial evidence – The employee's evidence concerning his motivation for filing the application was not credible – He was not honest regarding how he became aware that a termination application could be filed, when such an application would be timely under the LRA and in describing his alleged motivation for bringing the application – The only natural explanation the Board could draw from his dishonesty was the desire to cover up the fact that his employer initiated the application – Application dismissed

BEFORE: *Mark J. Lewis*, Vice-Chair.

APPEARANCES: *John Westdal* and *Patrick Poisson* appearing for the applicant; *Ron Lebi* and *James Barry* appearing for the responding party; *Andrew Tremayne* and *Pierre Diotte* appearing for the intervenor.

DECISION OF THE BOARD; April 3, 2008

1. This is an application brought under section 63 of the *Labour Relations Act, 1995,* S.O. 1995, c. 1, as amended (the "Act") seeking to terminate the bargaining rights of the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario, that jointly comprise the employee bargaining agency, for a bargaining unit of electricians and various other employees employed in the ICI sector of the construction industry in the province of Ontario. As set out in a previous Board decision concerning this matter dated May 9, 2007, the bargaining rights are found in the Provincial ICI Collective Agreement for Electricians, effective from May 1, 2004 to April 30, 2007 (the "Collective Agreement"). The applicant in this matter is Mr. Patrick Poisson and the responding union is IBEW Local 586 which is the IBEW local union (and the affiliated bargaining agent of the EBA for electricians) for the Ottawa area, the geographic area in which the employer carries on business. The correct name of the responding party is 2890275 Canada Inc. o/a ENER-TECH ("ENER-TECH" and/or the "Company") and the style of cause in this matter is amended accordingly.

Background Facts and the Positions of the Parties

2. ENER-TECH is an electrical contractor which carries on business primarily in the ICI sector of the construction industry in and around Ottawa. On November 7, 2006, the Board certified the Union as the exclusive bargaining agent for the employees of ENER-TECH in the standard IBEW craft bargaining unit in the ICI sector of the construction industry. As a result, ENER-TECH immediately became bound to the Collective Agreement. This application was filed with the Board on April 30, 2007, the last day of the first *open period* during which employees within the bargaining unit could apply to terminate the Union's bargaining rights with this Company.

3. At the commencement of the hearing concerning this application there were two issues which remained in dispute:

(a) the employee status of the applicant, Mr. Poisson; and,

(b) the Union's allegations that this application was employer supported and/or initiated contrary to section 63(16) of the Act and should therefore be dismissed.

4. However, in final argument the Union advised that it was no longer pursuing its position that Mr. Poisson was not an employee in the bargaining unit who was at work on the date of application. Accordingly the only outstanding issue is the Union's allegations under section 63(16) of the Act.

5. The Union's allegations concerning employer initiation and support of this application are not complex. It alleges that at or about the time of the certification (November 2006), Mr. Pierre Diotte, the owner, President and key employee of ENER-TECH, formulated a scheme designed to ensure that his company would return to being a non-union employer as soon as possible. According to the Union, this application marks the fulfillment of Mr. Diotte's scheme. It asserts that the *nominal applicant*, Mr. Poisson, could not have known when and how to bring this application, and would be unable to pursue this application, without the involvement and direct support of his employer. From the Union's perspective, Mr. Poisson is simply acting as the agent of Mr. Diotte and ENER-TECH in this matter.

6. Not surprisingly, both Mr. Poisson and ENER-TECH completely deny the assertions of the Union.

The Evidence

7. Three witnesses, Mr. Poisson, Mr. Diotte and Mr. James Barry, the Union's Business Manager, testified at the hearing. For obvious reasons, the vast majority of the direct evidence concerning how this application came to be filed was given by Mr. Poisson. It is his evidence, therefore, which is central to the ultimate disposition of this case.

Mr. Poisson's Evidence

8. Mr. Poisson has been an employee of ENER-TECH since 1994 when Mr. Diotte hired him. At that time, the two men were familiar with each other socially and Mr. Poisson's brother was already working (and continues to work) for the Company. Prior to being hired by ENER-TECH, Mr. Poisson had never worked in the construction industry. Since his initial hire, he has worked for the Company on a steady and continuous basis. It was his evidence that he has never worked for any other employer since first starting with ENER-TECH.

9. Initially he worked for ENER-TECH as a labourer. After approximately four years with the Company he became an apprentice electrician. Prior to the Union being certified in November 2006, he was a fourth year apprentice. Immediately following, and apparently at least in part as a result of, the certification he became a fifth year apprentice. Mr. Poisson agreed that he had been an apprentice for much longer than would normally be the case. He stated that the reason why he had

not become a journeyman electrician was that, even though he had the necessary work experience, he had never been to trade school to complete the academic portion of his apprenticeship. Mr. Poisson testified that he had avoided attending trade school because, as he had started in the trade at an older age than most and had a family to support, he couldn't afford the commitment in time and money that going to trade school would entail.

10. Mr. Poisson's evidence was that, as a result of the Union becoming certified and his immediate re-classification, his hourly wage rate had risen from approximately $17.00 per hour to $25.60 per hour. In addition to the rate increase, he agreed that he, and the other bargaining unit members, had received other financial gains, such as health and welfare and pension benefits and increased vacation pay, as a result of the Union becoming certified. Mr. Poisson agreed that he had accepted, and taken advantage of, these financial improvements and agreed that he, like everyone else, *liked getting more money*.

11. He stated that, since January 2007 at least, he had been steadily employed by the Company, although he indicated that, since becoming unionized, the number of hours for a regular work week (to be paid at the straight time rather than the overtime rate) had decreased from 40 to 36 hours. Other than these, and *a couple of weeks in November and December that were slow*, Mr. Poisson could not recall any other changes to his work life which had occurred since the Company had become unionized. It was his evidence that he suspected his wage rate would decrease if this application was successful but that possibility didn't concern him as he thought the standard weekly working hours would then also go back to 40 and moral at the Company would improve.

12. Mr. Poisson's only direct contact with the Union occurred in mid-November when he, along with other existing ENER-TECH employees, went to the Union's hall to be sworn in as members. At this time he was given a package by the Union which included, amongst other things, a copy of the Collective Agreement. Prior to this, Mr. Poisson had never been a member of a union. His evidence was that he had only joined the Union because it was necessary to stay working for ENER-TECH but that he personally was not interested in, and wanted nothing to do with, the Union. He did, however, testify that one of his uncles had been a member of the IBEW local union in Windsor, Ontario, and had not been well treated by it.

13. Mr. Poisson's evidence was that the initial idea to terminate the Union's bargaining rights was his alone. He testified that there was no specific event or overriding reason that led him to want to terminate the Union's bargaining rights. Rather he claimed he made his decision because: he didn't like being referred to as a *Brother*; he didn't like being treated as a number; he didn't like being on a list; and, he didn't like being told which companies he could and could not work for.

14. Mr. Poisson stated that he first became aware that it was possible to terminate bargaining rights, and when applications to do so could be brought, on the last Wednesday in April 2007 (Wednesday April 25, 2007), when he was looking over the package of materials he'd been given by the Union the previous November. He could not remember the specific document but Mr. Poisson was adamant that the Union's package contained a booklet which stated that applications to terminate bargaining rights could be brought within 90 days of the end of a collective agreement. The applicant called no further evidence to establish what document Mr.Poisson claimed to have read, although, as set out below, Mr. Barry was cross-examined regarding a particular section of the Collective Agreement and counsel for the applicant asked the Board to draw the inference that this was the booklet that Mr. Poisson was referring to.

15. The next day, Thursday April 26, Mr. Poisson stated that he raised the idea of terminating the Union's bargaining rights with a fellow employee, Mr. Michel Guindon, who was apparently receptive to it. Mr. Poisson decided that they needed to find a lawyer and Mr. Guindon suggested that they go to see Mr. Tremayne. Mr. Tremayne had acted for ENER-TECH in the Union's application for certification. Mr. Guindon had met, and been to the offices of, Mr. Tremayne as he had been interviewed by Mr. Tremayne as a potential witness in the certification matter. The two men went to Mr. Tremayne's office that afternoon but were advised by the receptionist that Mr. Tremayne's law firm would not act for an employee against an employer. She did, however, provide them with Mr. Westdal's name and address and suggested that he might be able to help them. Mr. Poisson and Mr. Guindon met with, and Mr. Poisson at least retained, Mr. Westdal later that Thursday. This application was subsequently filed by Mr. Westdal on behalf of Mr. Poisson on Monday, April 30.

16. Mr. Poisson's evidence was that he was aware from the start that retaining a lawyer would cost money. He estimated that this process would cost somewhere between $7,000.00 and $10,000.00 in legal fees which would be split fifty-fifty between him and Mr. Guindon. He claimed that he was able to afford his half of the costs by borrowing money from his family and friends.

17. The application form itself states that the applicant believed there were three persons employed in the bargaining unit on the date of application. Mr. Poisson's evidence as to how he had reached this estimate was somewhat confused. He acknowledged that shortly before April 30th there had been more employees at work, including some who had been referred to work with the Company by the Union, but that he believed that they had been laid-off by April 30th. He claimed he knew about the lay offs because he was aware that the work on the site that the other employees had been working at, the Cedarview Alliance Church, had definitely finished by April 30th. However, he was not aware of the jobsite where the third employee was working at the time. Finally, Mr. Poisson also acknowledged that it was possible he had received information about who was at work during the final days of April from Mr. Jean Diotte, an ENER-TECH supervisor and Mr. Pierre Diotte's brother.

18. Mr. Poisson claimed that the Company, and specifically Mr. Pierre Diotte, had had nothing to do with the filing of the application. His evidence was that the only time that Mr. Diotte may have even guessed that an application would be filed was on the afternoon of Thursday, April 26, when he and Mr. Guindon went to the Company's offices (located at Mr. Diotte's house) to ask for a copy of the Union' certificate which they had been instructed to get by Mr. Westdal. Mr. Poisson's evidence was that Mr. Diotte gave them the copy and said that he didn't want to know why they wanted it.

Mr. Diotte's and Mr. Barry's Evidence

19. Mr. Diotte testified that he had no involvement with the filing of the application and that he only became aware of it when a copy was faxed to his office. However, he did confirm that he had been asked for a copy of the certificate by Mr. Poisson and Mr. Guindon and that, although he didn't ask, he suspected that they wanted it to file a termination application. He also confirmed that he knew that the open period during which such termination applications could be filed lasted from February until the end of April 2007. Apart from any other reason, he had been specifically made aware of this by Mr. Barry in or about November 2006. Apparently, at the time of the certification there had been some discussions between these two men about whether Mr. Jean Diotte should be in the bargaining unit or not. Mr. Barry had explained to Mr. Pierre Diotte that it was the Union's position that Mr. Jean Diotte had to remain excluded from the bargaining unit until the end of the

2007 open period, so that he could not file a termination application, but that his status could be revisited once the open period had ended in May.

20. Both Mr. Diotte and Mr. Barry gave evidence about the Union's industry stabilization fund. This is a fund to which employers can apply for a rebate in respect of a portion of their wage costs for certain jobs. The fund is used to assist newly unionized employers, who have become automatically bound to the Collective Agreement, complete jobs which they bid on before they were unionized (and therefore had estimated on the basis of a lower hourly labour rate). Secondly, the fund is used to assist unionized contractors in bidding against non-union competition. Obviously, if the fund has agreed to compensate a contractor for a portion of the employees' wages the effective hourly labour rate to be used in estimating a job(s) is reduced and therefore the contractor has a better chance of securing the work.

21. Following the certification ENER-TECH received help from the stabilization fund for the completion of all of its existing jobs. However, after the certification, when bidding on jobs to start in and after the spring of 2007, it made almost no use of the fund. Mr. Diotte confirmed that after being certified the Company was bidding for primarily the same work, from primarily the same customers but, at the higher, union, hourly labour rate. Despite this, and despite the fact that Mr. Diotte agreed that he had been encouraged by Mr. Barry to make use of the fund when bidding for new work and that all of his invoices to the fund had been paid promptly and without question, of the 37 jobs bid (between November 2006 and May 2007) the Company only sought help from the fund for a single project. Mr. Diotte explained that he didn't want to use the fund because he wanted his Company to be able to stay in business without any assistance. He stated that he attempted to keep the company competitive despite the increase in labour costs (which he claimed he could not even guess at when giving his evidence) through increased planning and efficiency.

22. Mr. Diotte gave evidence that in early 2007 he had requested manpower from the Union. It eventually referred three men to the Company. These three individuals were all laid off at some point in April. Mr. Diotte could not remember the exact dates but thought that the last of them was laid-off during the second or third week of April.

23. Mr. Barry gave evidence, in-chief, concerning the package of materials that Mr. Poisson, as a new Union member, had received in November 2006. His evidence was that there was absolutely no document in those materials which related to termination applications and/or explained when such applications could be brought. In cross-examination by counsel for the applicant, Mr. Barry confirmed that Mr. Poisson, on joining the Union, was given a copy of the Collective Agreement and also confirmed that Sections 300 and 301 of the Collective Agreement state the following:

> **300 DURATION**
>
> This Agreement shall become effective on May 1, 2004 and will expire on April 30, 2007.
>
> **301 NOTICE**
>
> Either Party to this Agreement may give notice of change or termination of this Agreement in writing to the other Party not more than ninety (90) days prior to the expiry date and not less than thirty (30) days

> prior to the expiry date of this Agreement and negotiations must begin within fifteen (15) days of the giving of notice. If there is no notice given of change or termination of this Agreement, as mentioned in this Section, this Agreement shall remain in effect from term to term thereafter.

24. It was Section 301 of the Collective Agreement that the Board was invited to conclude that Mr. Poisson must have been referring to in his evidence.

Decision

25. Under section 63(16) of the Act, the Board may dismiss an application for the termination of a union's bargaining rights if it is satisfied that the employer or a person acting on behalf of an employer initiated the application. The concept of initiation for the purposes of this section was clearly defined by the Board in *Bytown Electrical Services*, [1996] OLRB Rep. Sept./Oct. 721, in which it stated:

> 109. We consider that the proper interpretation of the notion of "initiation" is to determine whether the employer's conduct amounted to significant or influential employer involvement giving rise to the termination application. In other words, if the application is founded in the conduct of the employer, then it can reasonably be concluded that the employer has initiated that application.

26. None of the parties in this case argued that this definition should not apply. Further all three parties agreed that there is no question that it is the union that makes the allegation of employer initiation that bares the onus of proving it.

27. In this case, I agree that there is very little (and in the submissions of the applicant and the intervenor no) *direct* evidence that establishes that it was ENER-TECH or Mr. Diotte, rather than Mr. Poisson, that initiated this application. However, I do not agree with the submissions of the applicant and the intervenor that this means that the Union has failed to meet its onus.

28. The very nature of allegations concerning employer initiation means that it will only be in the rarest of cases that unions will be able to call direct evidence to establish the requisite misconduct. Accordingly, and as the Board has consistently held, a union is perfectly entitled to meet its onus through circumstantial evidence which leads to the natural inference that the alleged impugned conduct actually occurred. In this respect the Board's decision in *Delta Rae Homes, A Division of 1138319 Ontario Inc.* [2007] O.L.R.D. No. 1637 (April 18, 2007) is directly and specifically relevant:

> 36. There is no question that the onus in proving employer initiation lies on the union that alleges it. At the end of the day, the Board must be persuaded that the employer has engaged in some activity which constitutes initiation for the purposes of section 63(16). I do not accept the proposition put forward by Delta-Rae Homes that the Board is not entitled to draw inferences about facts in the absence of direct evidence of those facts. As the Board said in *Ontario Lottery and Gaming Corporation c.o.b. as The Slots at Fort Erie Racetrack*, [2006] OLRB Rep. May/June 399 at paragraph 35:
>
> > I acknowledge that, as the Board noted at *Tenaquip Ltd.*, [1997] OLRB Rep. July/Aug. 742, because trade unions will

> not typically be in a position to establish affirmatively and directly an employer's involvement in an application for termination, it may be sufficient to adduce circumstantial evidence which then leads to an inference of misconduct.

On the facts of that case, the Board did not come to any conclusion of employer initiation (which should not really be characterized as "misconduct"). In *Tenaquip Ltd.*, [1997] OLRB Rep. July/Aug. 742, there was no direct evidence, although the Board had no difficulty in coming to certain conclusions based on the objectively reasonable circumstances of certain evidence (see paragraphs 31 and 32). Similarly, in *Fritz Electric, supra,* the Board relied on the direct evidence of certain discussions and drew inferences about the payment for the costs of the legal proceeding from the circumstances of the case (see paragraph 19).

37. That does not mean that every applicant and every employer in a termination application will be placed under some sort of microscope to ascertain whether every "i" has been dotted and every "t" has been crossed. In *Construction Workers, Local 53, CLAC*, [2001] OLRB Rep. May/June 722, the Board was asked to draw certain inferences based on the applicant's evidence and its alleged lack of precision and consistency. The Board disagreed that those were the appropriate inferences to be drawn, and said at para. 36:

> 36. Counsel for the union asked me to find Mr. Verhoeve's evidence unsatisfactory because it lacked precision and consistency, except when asked if management could see the activities, when Mr. Verhoeve's denials were, as counsel for the union put it, uncharacteristically firm. In contrast, I conclude that Mr. Verhoeve gave his evidence without guile. His answers were sometimes unschooled because, I conclude, he did not truly understand the significance of some issues. He clearly did not understand the significance of the "open period". But I do not conclude that Mr. Verhoeve was put up to this application by his employer. I believe that the more reasonable inference is that this application is rooted in the dissatisfaction of fellow employees Andrew Jarvis and Robert Plainte, who were union officials.
> ...

38. Taking all of the evidence in its totality, it cannot be said in this case that Carmen Calabrese and Daniel Calabrese gave their evidence "without guile". On the contrary, I conclude that they were neither forthright nor honest in their evidence about the relevant facts. I conclude Daniel Calabrese did have conversations with his father about how and when the Union's bargaining rights could be terminated. The only explanation for the accumulation of inconsistencies and illogical rationales that they put forward is that they were aware that this planning would possibly affect the outcome of this application and so decided to deny that it had taken place.

39. I have concluded that Daniel Calabrese and Carmen Calabrese were not being honest when they denied any, or any significant, discussion about the application. I further conclude that the discussions had to do with the

> desirability of bringing the application, the co-ordination of the dates of the No-Board Report and the filing of this application, and were probably influenced by the filing of the First Collective Agreement application. The exact nature of the conversations is known only to Daniel Calabrese and Carmen Calabrese, but they were clearly of much greater significance than either of them made the conversations out to be.
>
> 40. I find that the employer, Delta-Rae Homes, in the person of Carmen Calabrese, was directly involved in the initiation of the application contrary to subsection 63(16). Accordingly, this application is dismissed.

29. From an evidentiary perspective, this case is almost identical to the situation that the Board dealt with in *Delta Rae Homes, supra.* Here I do not conclude, as the Board did in *Construction Workers, Local 53, CLAC, supra,* that Mr. Poisson's evidence concerning the filing of this application, while perhaps being somewhat *unschooled* or *confused,* nevertheless led to the reasonable inferences that the application arose out of his and Mr. Guindon's dissatisfaction with their union. Rather, and as the Board found in *Delta Rae Homes, supra,* I conclude quite the opposite and find that Mr. Poisson's evidence concerning how and why this application came to be filed was entirely unbelievable and was not true.

30. Mr. Poisson's explanation as to how he became aware of the possibility of filing a termination application, and when such applications would be timely, provides perhaps the most obvious example of his complete lack of credibility.

31. His evidence was that he was not interested in the Union. It is therefore very strange that, on the evening of Wednesday April 25, he would just happen, for no particular reason, to be looking through the package of materials that he had been given by Union almost six months before and thereby discovered that he could terminate the bargaining rights.

32. I accept Mr. Barry's evidence that this Union (as is almost certainly the case with every other union in Ontario) does not give out documents that describe how and when to terminate bargaining rights when swearing in new members. The only possible document in the package given to new members that Mr. Poisson could have been referring to is, then, the Collective Agreement. The *fortuitous* timing of his decision to find and read the Collective Agreement, when only two regular working days in the open period remained, is suspicious in and of itself. However, the conclusion that he claims to have drawn from this document is simply too incredible to be believed.

33. In this respect, the applicant's ultimate position was that it was Section 301 of the Collective Agreement that he read that night and interpreted as meaning that he could terminate the Union's bargaining rights in the last 90 days of the Agreement. Obviously, and as noted above, Section 301 does contain the word *terminate* and does refer to *90 days prior to the expiry date* [of the Collective Agreement]. However, this section also makes quite clear that the right to terminate the Agreement belongs to parties thereto. Mr. Poisson wasn't one of those parties and there was no evidence that he ever believed that he was. On the other hand, it would be completely natural for an employee to assume that his employer was a party to the Agreement. This then begs the obvious question that, if he really read this clause, and really believed that it allowed for the termination of the bargaining rights, why would Mr. Poisson assume he and his fellow employee Mr. Guindon, could or should do anything other than approach Mr. Diotte and request that ENER-TECH advise the Union that the Collective Agreement was terminated.

34. Further, the date on which Mr. Poisson claims to have read, and conveniently misinterpreted, the collective agreement is well past the time period referred to in section 301and as such his explanation is completely illogical. The time period for giving notice of termination of the Collective Agreement is clearly defined by Section 301 as being *not more than ninety (90) days prior to the expiry date but not less than thirty (30) days prior to the expiry date of this Agreement* [emphasis added]. Lay persons can easily misinterpret the language of collective agreements but if Mr. Poisson was able to conclude, as he asks the Board to believe, that as the Agreement ended on April 30th, 2007, April 25th was within the last 90 days, why was he not also able to adduce that April 25th was considerably less that 30 days prior to April 30. To read, and misinterpret this section of the Agreement on April 25th, 2007, doesn't lead to the conclusion that a timely application for the termination of bargaining rights could be filed within the next five days. Rather this section could only naturally lead Mr. Poisson to the conclusion that he had missed the deadline by 25 days.

35. Mr. Poisson's explanation as to why he wished to file this application is also significant in determining how this application was initiated. In saying this, the Board accepts that employees may have any number of reasons for filing termination applications which others, including the Board itself, might find to be somewhat illogical without in anyway running afoul of section 63(16) of the Act. Quite simply, an employee has the right to file an application seeking to terminate his or her union's bargaining rights. No reason, yet alone a reason that anyone else thinks is sufficient or logical, is required. However, where, as in this case, an employee gives evidence concerning his motivation for filing the application, the Board is perfectly entitled to consider such evidence, judged in the context of the totality of all of the evidence, in assessing the employee's overall credibility.

36. I am prepared to accept that Mr. Poisson did not particularly like unions. However, I find that his evidence that he decided to file and pursue this application, without any encouragement from his employer, because of this general dislike not to be credible. With respect to the specific problems that he identified as having with unions, Mr. Poisson's evidence was that the only time he had ever been called *Brother* was on the one occasion, some six months before, when he had gone to the Union's hall to become a member. He had, as far as he knew, never been placed on any list or been treated as a number by the Union. Further, the only construction company that he had worked for, and the only construction company that he apparently wanted to work for, was ENER-TECH and it is therefore completely unclear who had ever told him he had to work for, and/or could not work for, some other company.

37. I also find Mr. Poisson's evidence concerning the likely outcome of terminating the Union's bargaining rights, and his reaction thereto, to be significant to my findings as to his overall lack of credibility. He stated that he expected that his wage rate would decrease if the Union was terminated but that would not be a problem as the lower hourly rate would be at least somewhat offset by being able to work additional hours. This position is, however, completely contrary to the reasons he gave for not going to trade school and thereby becoming a journeyman, something that he acknowledged would clearly be in his own best interests. If he could not afford to go on EI benefits for the weeks of his schooling and could not afford to spend any extra time studying because of his daughter's after school activities, why would he then deliberately set out to reduce his income and increase his working hours by terminating the Union? Such a course of action is even more illogical, and thereby further undermines Mr. Poisson's credibility, given his evidence that he thought he would have to pay between $3,500.00 and $5,000.00 (assuming Mr. Guindon paid his half) in legal fees, along with having to take days off work without pay, in order to pursue this application.

38. Applications for the termination of bargaining rights don't *just happen*; they must be initiated by somebody. It is the applicant, in this case Mr. Poisson, who is in the best position to explain how an application came to be filed. Here, I have concluded that Mr. Poisson was not honest in his evidence concerning how he became aware that a termination application could be filed, when such an application would be timely under the Act and in describing his alleged motivation for bringing this application. Accordingly, and considering all of the evidence, the only natural explanation of, and the inference I draw from, Mr. Poisson's lack of honesty is that he wishes to cover up misconduct and that his employer, ENER-TECH, in fact initiated this application.

39. In this case the conclusion that the application was employer initiated is also supported by the rest of the evidence, albeit that such evidence is only circumstantial. Mr. Poisson was a long-term, loyal employee who owed his entire career in the construction industry to the Company and Mr. Diotte. Mr. Diotte certainly knew about the open period and had positioned his Company such that the potential impact of the Union's bargaining rights being terminated would be very limited. Specifically, he had deliberately not made use of the Union's industry stabilization fund in circumstances where there is no obvious business reason for not doing so. Finally, the application was filed during the extremely narrow period of time which existed between the end of the open period and the Company laying-off the employees who had been referred to work with it by the Union. Although none of these facts would be determinative in and of themselves, their cumulative effect, when combined with Mr. Poisson's overall lack of honesty, is sufficient to establish, as I hereby conclude, that ENER-TECH initiated this application.

40. Accordingly, as I have found that the employer initiated the application contrary to section 63(16) of the Act, this application is hereby dismissed.

0067-07-R; 0513-07-U Universal Workers Union, Labourers' International Union of North America Local 183, Applicant v. **921964 Ontario Limited o/a Scugog Signs**, Responding Party

Practice and Procedure – Unfair Labour Practice – The employer moved to strike several allegations in the union's unfair labour practice complaint – The Board held that an altercation between two bargaining unit members that involves no threats to either's job security, and about which the employer has no knowledge, cannot support a complaint regarding employer misconduct – As for the other employer objections (regarding purported intimidation by the employer in conversations with individual employees), the Board ordered the union to particularize the allegations, failing which the company will not be required to adduce any evidence in its defence – Matter continues

BEFORE: *Patrick Kelly*, Vice-Chair, and Board Members *R. O'Connor* and *S. McManus*.

DECISION OF THE BOARD: March 27, 2008

1. These are an application for certification (Board File No. 0037-07-R) and an unfair labour practice complaint (Board File No. 0513-07-U) under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended ("the Act").

2. The status issues in the application for certification have been resolved through a combination of the Board's decision of October 11, 2007 and the parties' subsequent agreement. The unfair labour practice complaint ("the complaint") remains outstanding, and will be dealt with in the continuation of the hearing on April 3, 2008.

3. By letter dated February 29, 2008, counsel for the responding party ("the company") requested that several of the allegations in the complaint ought to be struck or dismissed. We directed the filing of written submissions, which we have received and reviewed.

4. The company objects to three of the applicant's allegations in the complaint. The first of these concerns a confrontation between two employees, Simon Aschaber and Laura Swain, on April 13, 2007, described at paragraph 7 of Schedule B of the complaint. Mr. Aschaber, an alleged union supporter, cut his finger at the worksite and attended at Ms. Swain's work area to obtain a first aid kit. According to the complaint, Ms. Swain was a managerial employee of the company, and in charge of the first-aid kit. Although she allegedly typically assisted employees in need of first-aid, on this occasion the union contends that she refused to assist Mr. Aschaber because she perceived that he was behind or supported the application for certification. This prompted an argument between the two, concluding with Ms. Swain allegedly kicking a garbage can in Mr. Aschaber's direction and telling him to tend to his own injury.

5. Since the complaint was filed, the applicant (or "the union") abandoned the position it had taken that Ms. Swain was a managerial employee. Instead, at the hearing into the application for certification, the union's position was that Ms. Swain was not an employee in the bargaining unit by virtue of her performing office and clerical duties. We rejected that submission in our decision of October 11, 2007, wherein we concluded that Ms. Swain, despite being a close personal friend of the owner of the company, Ron Haslam, was a production employee in the bargaining unit.

6. The company contends that a disagreement between members of the same bargaining unit should not be the basis for any unfair labour practice allegations against an employer, even if the comments between them are potentially offensive to the Board. It cites *Alderbrook Industries Limited*, [1981] OLRB Rep. Oct. 1331, wherein at paragraph 13, the Board stated:

> 13. Unfortunate as it may be, it is not uncommon for antagonism to be generated between employees who line up on opposite sides of a campaign for union representation. Statements by any person amounting to intimidation or coercion of an employee, whether they are made for or against a union, are clearly contrary to section 70 of the Labour Relations Act and are grounds for a complaint under section 89 of the Act. They may also form the basis for criminal charges. It does not follow, however, that the indiscretions of employees, whether they favour a union or sympathize with their employer, are to be held against the principal parties to an application for certification. The Board can no more hold against a union a verbal threat made to an employee's job security by an indiscrete employee who is neither a union officer nor a collector of union membership cards than it can hold against an employer similar threats made by a fervently anti-union employee acting on his own. Evidence of widespread threats which are made by neither the employer nor the union might, of course, cause the Board to resort to the further evidence of a representation vote.

7. The company points out, correctly in our view, that the confrontation between Ms. Swain and Mr. Aschaber involved no threats by Ms. Swain to Mr. Aschaber's job security. It was simply a heated exchange between two co-workers. As such, the company argues that the allegation should be struck.

8. Counsel for the applicant submits that the request of the company to strike any of the allegations in the complaint, including those pertaining to the Swain-Aschaber confrontation, is untimely, in that it could have been made long ago rather than "virtually on the eve of the hearing". We reject that argument. Counsel for the company's request was made on February 29, 2008, approximately five weeks prior to the next scheduled hearing date. That hardly constitutes a request on the eve of the hearing into the complaint.

9. With respect to the Swain-Aschaber altercation, the applicant contends that the obligation to provide first aid to an injured worker is that of the employer, and that the denial of first aid by anyone, including a fellow bargaining unit member, because of the injured worker's support for a union, is heinous and disgraceful, particularly where, as in this case, the person denying access to first aid is a close personal friend of the owner of the company. It was reasonable, says the applicant, for Mr. Aschaber to conclude that Ms. Swain's actions against him were undertaken on behalf of the company's owner. It was reasonable for him and other employees to conclude that union supporters would no longer have access to first aid as a result of their union affiliation. In the alternative, the allegation should be treated as important background and context for the remainder of the complaint.

10. We are not persuaded by the applicant's argument on this point. First of all, there was no allegation by the applicant that Mr. Aschaber or any other employee was aware of Ms. Swain's friendship with Mr. Haslam. Secondly, there was no allegation by the applicant that Mr. Haslam or any other management representative of the company counseled or encouraged Ms. Swain to deal harshly with union supporters, or that management were aware of or condoned her actions against Mr. Aschaber. Thirdly, there were no threats directed at Mr. Aschaber. In our view, the altercation between Ms. Swain and Mr. Aschaber was simply a heated argument between bargaining unit members (apparently without having been overheard or observed by other employees) for which there is no available remedy as against the company. There is no labour relations purpose to inquire further into the altercation. Nor is it contextual information that would assist the Board in determining if there was an anti-union environment in this workplace *created by the company*. Accordingly, paragraph 7 of Schedule B of the complaint is hereby struck in its entirety.

11. The second objection of the company pertains to paragraph 10 of Schedule B. It alleges that in the period following the receipt of the application for certification, Ron Haslam and Jim White, another company employee, regularly attended on the shop floor and spoke in an aggressive, abusive and sarcastic manner to those employees they suspected were supportive of the union, criticizing their work and/or making derogatory, non-work related comments. By way of example, the applicant contends that Mr. White told bargaining unit employee Kristen Bons that Mr. Haslam felt Mr. White should transfer her to a position of less responsibility because she was not deserving of her current position.

12. Counsel for the company points out that in the response to the complaint the company requested particulars of the White-Bons conversation and any other similar discussions between Mr. White and Mr. Haslam with other employees. The applicant has since informed the company that the discussion involving Ms. Bons was with Mr. Haslam, not Mr. White, and that it took place on the day

of the representation vote. The applicant has not provided particulars of any other similar conversations involving employees other than Ms. Bons. Accordingly, the company submits that the Board should disregard all but the allegations in paragraph 10 of Schedule B that deal with the Haslam-Bons discussion.

13. The applicant, on the other hand, says that the paragraph in question is sufficiently particularized, and further, that Mr. Haslam is in a position to take the stand and testify whether or not he has had conversations of the kind therein described with employees, including Ms. Bons. In the alternative, the applicant contends that the allegations in paragraph 10 ought not to be struck before the union has an opportunity to provide particulars in response to a Board order.

14. In our view - and despite the vigorous protestations by counsel for the company - the applicant ought to provide the Board and the company particulars of its paragraph 10 allegations, minus those pertaining to Ms. Bons. Those allegations are clearly relevant, and there appears to be sufficient time prior to the resumption of the hearing for the union to provide the particulars and for the company to prepare its case in respect of them. If the union has knowledge of specific inappropriate conversations between Mr. White and/or Mr. Haslam on one hand, and shop floor employees other than Ms. Bons on the other hand, the union must provide those to counsel for the company on or before 12:00 p.m. on April 1, 2008. If the union fails to do so, or if the particulars are found by the Board to be inadequate, the company will be relieved of its obligation to tender any evidence about the conversations, other than the Haslam-Bons discussion alleged to have taken place on the day of the vote.

15. Finally, the company takes issue with paragraph 15 of Schedule B. It reads:

> 15. Another Scugog employee, Kyle Hadden, was a key inside organizer for the Union. After the Certification Application was filed, Hadden was approached by Swain and Haslam's wife, who both aggressively insisted that they knew that Hadden was behind the organizing drive. Hadden had similar encounters with both Haslam and White. Hadden was intimidated by these encounters to such an extent that he did not attend at the representation vote.

16. In its filed response, the company requested particulars of the conversation alleged to have occurred between Mr. Hadden and the two company employees, Ms. Swain and Ms. Haslam. However, the union replied that it was unable to provide further particulars because Mr. Hadden had refused to have any further contact with the applicant or its representatives.

17. The company maintains that paragraph 15 ought to be struck in its entirety because the union has failed to particularize any of the allegations, including its allegation that Mr. Hadden was the victim of similar inappropriate conversations with Mr. White and Mr. Haslam.

18. The union argues that paragraph 15 is fully and completely particularized in the sense that it contends that a union supporter (Mr. Hadden) was approached by four named persons (Ms. Swain, Mr. White, Mr. Haslam and his spouse) accusing him of being behind the applicant's organizing drive. In any event, if the allegations are not sufficiently particularized, the union contends that the Board ought not to strike them but rather order the applicant to provide them.

19. For the same reasons articulated in paragraph 14 of this decision, we order the union to provide the particulars sought by the company in respect of paragraph 15 of Schedule B, within the same time frame. Again, if the union fails to do so, or provides inadequate information in the opinion of the Board, the company will not be required to adduce any evidence concerning those allegations.

0837-06-R Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Applicant v. **Barclay Construction Group Inc.**, Responding Party v. International Union of Operating Engineers, Local 793; Labourers' International Union of North America, Ontario Provincial District Council; SNC-Lavalin Power Ontario Inc.; I.B.E.W. Construction Council of Ontario; International Brotherhood of Electrical Workers, Local 353; Goreway Station Partnership, by its managing partner, Sithe-Global Power Goreway ULC, Intervenors

Certification – Construction Industry – Sector Determination – The first issue to be decided in this application for certification was whether the project (the construction of Goreway Station – a combined cycle gas-powered generation station) was in the ICI or electrical power systems sector – After reviewing the historical background and case law dealing with the boundaries of the electrical power systems sector, the Board addressed the factors for determining a sector dispute – The Board found that the bargaining patterns pointed strongly to the ICI sector; that work characteristics also indicated that the work fell within the ICI; and finally that end use pointed to the electrical power systems sector (although not as strongly) – The Board concluded that the bulk of the project fell in the ICI, and accordingly the application was untimely – Application dismissed

BEFORE: *David A. McKee*, Vice-Chair.

APPEARANCES: *Doug Wray* and *Rick Harkness* for the applicant; *Stephen McArthur* and *Janet Callfas* for the responding party; *Robert Gibson* for International Union of Operating Engineers, Local 793 and Labourers' International Union of North America, Ontario Provincial District Council; *Mort Mitchnick* and *Marni Halter* for SNC-Lavalin Power Ontario Inc.; *Stephen Wahl* for I.B.E.W. Construction Council of Ontario and International Brotherhood of Electrical Workers, Local 353; *F.R. von Veh, Frank Bajc* and *Julia Falevich* for Goreway Station Partnership, by its managing partner, Sithe Global Power Goreway ULC; *A.M. Minsky, Laurie Kent* and *Jay Peterson* for Central Ontario Building Trades.

DECISION OF THE BOARD; April 8, 2008

Introduction

1. This is an application for certification brought pursuant to the construction industry provisions, and in particular section 128.1, of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The applicant (the "Carpenters") has applied to represent a bargaining unit of carpenters and carpenters' apprentices employed by the responding party ("Barclay") in all sectors of the construction industry other than the ICI sector. Both the Carpenters and Barclay agree that Barclay is bound to the Carpenters' provincial collective agreement in the ICI sector and that the

Carpenters hold no bargaining rights in non-ICI sectors. The first issue to be determined in this application is the sector in which the Project fell. If it is in the ICI sector, the application must be dismissed as the Carpenters and Barclay are already bound to the provincial collective agreement in that sector. Assuming without deciding that a union can displace itself under an existing collective agreement, such an application would be untimely at the time it was made. If it is in a non-ICI sector (in this case the electrical power systems sector), there are other issues relating to bargaining unit description to be dealt with.

The Project

2. The Project on which Barclay's employees were working was the construction of part of the Goreway Station. The Goreway Station is a combined cycle gas-powered generating station constructed on the Goreway site in Brampton. It was built to generate up to 874 MW of power to be supplied to the electricity market through Hydro One's Claireville Transformer Station.

3. It is supplied with its basic fuel, natural gas, through an underground pipeline built by Enbridge Gas Distribution. This is not part of the Project examined in this sector dispute. It is also supplied with water from an unidentified source. The Project consists of three combustion Turbines that burn gas to heat water into steam, combined with three Heat Recovery Steam Generators ("HRSG") which also generate steam using the exhaust heat from the main Turbines. The steam is all delivered from the steam Turbines to one condensing steam-powered electric Generator that transforms the steam energy into electrical energy. The electrical energy is fed from the Generator to a connection point on two nearby Hydro One 230 KV transmission circuits.

4. While similar facilities use the steam for other commercial or industrial purposes, there is no likely potential customer near enough to whom the steam might be sold for heat or other purposes. Thus, it is built in the expectation that it will be used solely to generate electrical power.

5. The plant is capable of being operated on a single cycle or a combined cycle operation. In a single cycle operation, one or more of the combustion Turbines is operated by itself (i.e. without the use of the HRSG) to produce steam. In a combined cycle, the combustion Turbine and the HRSG are used together. The combined cycle is a more efficient use of energy. The single cycle is used in two circumstances. The first was when the Project was only partially complete to provide power that was badly needed by customers in the western Greater Toronto area. The second use (once the Project is complete) will be when the price of electricity drops to the point where it does not pay the owner to produce the maximum electrical output, and so it will be able to reduce the production of electrical power.

6. The owner of the site is Sithe-Global Power (Goreway Station) ("Sithe-Global"). The primary general contractor or Project manager for much of the Project is SNC-Lavalin Power Ontario Inc. ("SNC-Lavalin"). For purposes of this decision, neither is bound to any collective agreement with a construction trade union. The primary subcontractors on the site included Barclay Construction Group Inc., James Kemp Construction Limited, Alberici Construction Inc. and General Electric Energy Global Energy Service. All were bound to various provincial collective agreements and worked under these agreements on the Project. A more detailed examination of the bargaining rights that applied on this site are set out in a decision of the Board in *SNC-Lavalin Power Ontario Inc.*, [2007] OLRB Rep. July/ Aug. 800.

Analytic Framework

7. The Board's approach to sector disputes is set out in the decision of the Board in *The Corporation of the City of Sault Ste. Marie*, [2002] OLRB Rep. Sept./Oct. 870 (October 3, 2002). Essentially, there are three primary factors: end use, work characteristics and bargaining patterns. The Board said at paragraph 39:

> 39. In the end, what this means is that there is no single test which can be applied to determine sector, nor is there a descending order of factors which directs the Board to look at the "end-use" first and only later at work characteristics or bargaining patterns as a means of resolving doubtful cases. It is necessary to examine all the relevant factors. In most cases all of them will be present to some extent (or one will and the others will be neutral). It is where they do not point in the same direction that the Board must determine which sector the work falls in, having regard to both of the statutory definition of sector and the statutory purpose of sectoral divisions.

While the International Union of Operating Engineers, Local 793 and the Labourers International Union of North America, Ontario Provincial District Council (the "Labourers/Operating Engineers") emphasized certain earlier decisions that placed a greater emphasis on "end use", they acknowledged that the Board since the decision in *Sault Ste. Marie*, *supra*, has used the analytic framework of that decision in cases such as this. For the reasons set out in that decision, I will use it in this case as well.

8. There are, perhaps, a greater number of factual and analytic issues that arise in this decision, but they are all simply elaborations of the same basic three factors. The fact that there are more analytic issues is not surprising. There are only a few decisions of the Board that deal with boundaries of the electrical power systems sector, and only one that approaches it directly. Hence, the debate among the parties ranged over a number of issues.

Historical Background and Case Law

9. Before turning to these three primary issues, it is helpful to look at some historical context, both in the industry and in the Board's jurisprudence. The parties argued it extensively, perhaps because there are so few decisions of this Board. While the electrical power systems sector and the ICI sectors have been defined by the Act since 1971, the Board has rarely had to deal with how to define the boundary between the two. The parties referred to four decisions: *Ontario Hydro*, [1998] OLRB Rep. May/June 456 ("*Ontario Hydro '98*"); *Ontario Hydro*, [2005] OLRB Rep. May/June 437 (May 6, 2005) ("*Ontario Hydro '05*"); *Ontario Power Generation Inc.*, [2005] OLRB Rep. July/Aug. 675 (August 22, 2005) (the "*OPG decision*"); *Leo Alarie & Sons Limited*, [2006] OLRB Rep. Sept./Oct. 721 (October 31, 2006) ("*Leo Alarie*"). Only the latter two have really dealt with the issue in this case, and only the last directly. To a greater or lesser extent, all four decisions referred to a 1978 report by Prof. Ellis, Q.C., delivered to the Provincial Government at the very beginning of province-wide bargaining in the ICI sector, and what that Report did to affect the course of bargaining in the electrical power systems sector until the end of the 1990's.

The Ellis Report as an Aid to Interpretation

10. Much was said at the consultation about this Report, and it has been examined at length in two decisions of the Board, *Ontario Hydro '05* (in which I chaired the panel) and *Leo Alarie*, *supra*.

Those two decisions come to different conclusions about how one should read the Ellis Report, as well as how one should use it to interpret the Act. The different analyses are set out at paragraphs 66-81 in *Ontario Hydro '05* and paragraphs 12-16 of *Leo Alarie*. There is no need to quote them at length here. Simply stated, I do not accept the analysis of the Ellis Report in the *Leo Alarie* case, but more importantly, I do not accept the manner in which it was used there to interpret the Act. In my view, the Ellis Report is of historical interest, but is of little assistance in interpreting the sectors defined in the Act.

11. Briefly, Prof. Ellis said in an introductory paragraph:

> "The construction industry, or at *least those construction industry participants who are most concerned about the issues of interest in this Inquiry in fact understands the Electrical Power Systems Sector to be primarily an euphemism for Ontario Hydro's Construction Program* – both the construction of long-distance high-voltage transmission lines and transformer stations, and the construction of major power generation projects, such as the Pickering Nuclear Power Generating Project and the Bruce Nuclear Power Development Project. But any reasonable interpretation of the words themselves will also encompass the construction of municipal, low-voltage, distribution lines and related facilities (not constructed by Ontario Hydro except occasionally under special contract from the Municipality) and the construction of privately-owned generation and transmission facilities. Nevertheless, the labour relations issues which separate existence of the EPS sector vis a vis the ICI sector has raised, do not relate to these municipal or private segments of the EPS sector. Accordingly, I have considered these latter segments only from the point of view of how they might be affected by my recommendations for solving the Ontario Hydro – ICI problem".

12. The Act specifies an electrical power systems sector without defining it. It is evident that the words on a page can have a variety of meanings if one looks only at the words divorced from their context. In my view, *Leo Alarie* places too great an emphasis on the word "primarily" in the first sentence of the above passage. Prof. Ellis was, after all, both an academic and a person from outside the field of construction labour relations. One would expect to find some hesitancy and modification in his words. However, aside from those few words, the Report goes on at length to describe the "real" electrical power systems sector that he was asked to inquire into: the bulk power system of Ontario Hydro.

13. SNC-Lavalin provided the Board with extracts from the legislative debate recorded in Hansard in 1977 that led to the appointment of Prof. Ellis as an Industrial Inquiry Commissioner, material that the Board did not have before it in making previous decisions. These debates were part of the debates surrounding the introduction of changes to the Act that extended bargaining in the ICI sector on a province-wide basis. Mr. O'Neill, from the Opposition, moved the adoption of an amendment to what is now section 154 that the industrial, commercial and institutional sector of the construction industry "shall be deemed to include the electrical power systems sector of the construction industry". He referred to debates about this proposal at hearings held in Thunder Bay, London, Ottawa, Sudbury and Toronto. He was very specific about what he proposed. At page 1167(i) he said:

> "The point has been made by our party as to our feelings that Ontario Hydro should come within the scope of this Bill as of that date, April 30, 1980".

Mr. Bounsell, also an Opposition MPP, added:

> "We too would like very much to see Ontario Hydro covered in province-wide bargaining ...".

He referred to the Minister's commitment, in response to those concerns raised at the Committee hearings across the Province, to support an industrial inquiry commission: "to consider the extension of this Bill [requiring province wide bargaining in the ICI sector] into the electrical power systems sector" and referred to the terms of reference: "the feasibility of the merger of the electrical power systems sector with the industrial, commercial and institutional sector". The debate was carried on for some time, and there was no doubt about what was being discussed. One MPP, on behalf of the Government, stated:

> "As I understand the issue before this House, it is a problem relating to how the bargaining carried on by Ontario Hydro in the Province of Ontario affects the rest of the bargaining in the construction industry".

14. The Minister of Labour at the time responded at pages 1177-1178 as follows:

> ... It has been mentioned that the Franks report was favourable to the inclusion of the electrical power system segment in the industrial, commercial and institutional sector, from which it is now separated. ...
>
> ...
>
> Although I recognize the rationale for the inclusion of Hydro, I would put it to this House that indeed it would be entirely disruptive to the passage of this bill to include any specific date at this time for the inclusion of Hydro. Therefore, in light of the comments that were made within the clause-by-clause discussions of Bill 22 by the committee, I did propose that we would appoint an industrial inquiry commissioner to examine the feasibility, the methods, the potential costs, the difficulties and the method by which to bring Hydro into this bill or into a similar bill; and that we would do it within a very short period of time, we are prepared to do so.

The debate ended at page 1179 when the Opposition amendment was defeated and the provisions of the Bill passed as proposed. What is significant about the debate is the fact that the issue had arisen at committee hearings, and that the government of the day had determined not to decide anything until it heard from Prof. Ellis, about the merger of the ICI and electrical power systems sector, and second, that the electrical power systems sector was, for the purposes of that debate, regarded as synonymous with Ontario Hydro.

15. This is significant for these reasons. The first and least important one is that this was the issue Prof. Ellis was asked to look at. That is, he was not being asked to look at the interaction between municipal distribution lines and related facilities, nor the privately-owned generation and transmission facilities. The issue was collective bargaining with construction employees and unions at Ontario Hydro, and indeed, the entire Report focuses on Ontario Hydro. His concern about the

potential ambiguity of the dictionary meaning of the words "electrical power systems sector" did not come from the Legislature, nor did it come from those who appeared before him. That is, the electrical power systems sector was synonymous with Ontario Hydro to everyone else in the Province, and in fairness, Prof. Ellis thought that it should be as well. He simply recommended that this general knowledge be set down in an explicit and definitive set of words.

16. The Legislature did not accept that recommendation. I see no reason to give that historical fact any weight at all. Prof. Ellis was not asked to report to the Legislature on the issue, and indeed, did so only with a view to focusing the scope of his Report more precisely. More importantly, I am unaware of any authority for the proposition that any conclusion ought to be drawn from the fact that the Legislature chooses not to act on gratuitously offered advice.

17. There is another, and to my mind more plausible, conclusion to be drawn from the Legislature's inaction, although in the end, I place no weight on that either. By 1977, the Board had already come up against the difficulty of defining any sector of the construction industry: see *Heavy Construction Association of Toronto*, [1973] OLRB Rep. May 245. The Legislature had not sought to define any of the sectors. Indeed, as set out in *Ontario Hydro '05*, it was attempting to regulate what existed rather than to prescribe what should exist. Thus, even if the Legislature (or the Government) had been interested in the subject (of which there is no evidence), it was not an item that had arisen in the public hearings or had become any sort of a political issue. I suspect it was much more likely that the Legislature or Government had entrusted the definition of sectors to a specialized tribunal and saw no reason to concern itself with an issue that no one else cared about.

18. This strikes me as the more likely conclusion to draw, but there is no means of determining whether it is correct. It is perhaps simply an example of how no conclusion of any sort should be drawn from the fact that the Legislature refrains from acting on the basis of advice it neither sought nor was asked to seek.

19. I do not wish to overstate the consequence of this conclusion. This is not a case about whether the electrical power systems sector in general can encompass more than work on property owned by or involving Ontario Hydro. The *Leo Alarie* case stands for the proposition that one type of project the Board examined that had nothing to do with Ontario Hydro was in the electrical power systems sector. This case is about whether the Goreway Station is in the ICI or in the electrical power systems sector. However, I do reject the argument of the Labourers/Operating Engineers that there is any weight to be given or even a coherent conclusion to be drawn from Prof. Ellis' recommendation that the Legislature ignored.

Case Law

20. There are four decisions to which the parties referred, two of which are of limited assistance. In *Ontario Hydro '98*, the Board dealt with an application for certification by the UA and the Labourers in respect of employees of Ontario Hydro working on property not owned by Ontario Hydro. Despite the headnote of that case, it does not appear that any argument was directed as to which sector the employees were working in. The unions had applied for certificates under section 154(1) of the Act. The issue the Board dealt with was whether a bargaining unit of the second, non-ICI certificate, should make reference to sectors or collective agreements. At paragraphs 22 through 24, the Board said:

> 22. At the outset, we will dispose of the easiest issue raised in these proceedings. In our view, the exclusions in the bargaining unit descriptions respecting the bargaining rights currently held by the applicants in the electrical power systems sector ought to be effected by reference to the specific collective agreements rather than by reference to the sector itself.
>
> 23. The reason for such a conclusion is evident. Section 146(2) of the Act requires that, upon certification of the applicants by the Board, two certificates will issue. One of the certificates is to be confined to the I.C.I. sector of the construction industry. The other certificate is to encompass "all other sectors in the appropriate geographic area or areas". Presumptively, then, the latter certificate would encompass the electrical power systems sector of the construction industry.
>
> 24. However, the parties have already bargained certain rights of representation in the electrical power systems sector of the construction industry. These representation rights ought to be carved out of the second certificate. However, the full scope of these bargaining rights is uncertain, as the rights were achieved by way of voluntary recognition and not certificate. *The EPSCA collective agreements binding Ontario Hydro and the U.A. and Labourers', respectively, may, or may not, encompass the entire electrical power systems sector.* If they do not, excluding those bargaining rights from a certificate by reference to the sector itself would have the effect of excluding from representation those construction labourers and plumbers and pipefitters who fall beyond the reach of the EPSCA agreements, notwithstanding that it is evident that the intention of section 146(2) of the Act was to capture all of those employees within the certificate representing all other sectors of the construction industry other than the I.C.I. sector.
>
> [emphasis added]

Although reliance was placed on this decision elsewhere, it is evident that the Board declined to make any decision on the issue in that case.

21. In *OPG*, the Board dealt with a number of applications for certification of unions seeking to represent employees of employers who were working on Ontario Hydro property and had been applying, and were bound to, the collective agreement with EPSCA. At paragraph 23 of that decision, the Board referred to the EPSCA collective agreement and stated: "that bargaining unit [in the EPSCA collective agreement] may have been viewed by the applicants at one time as if it was congruent with the electrical power systems sector. Nevertheless, that was never, in fact, the legal situation". The statement arises from the positions adopted by all parties rather than from a conclusion that the Board reached in any contested situation (see *Leo Alarie* at paragraph 19).

22. In *Ontario Hydro '05*, the Board dealt with an application under subsection 1(4) and section 69. The primary issue was whether the certificates issued in 1950 and the subsequent collective agreement (ultimately the EPSCA collective agreement) extended the bargaining rights of the applicant into the ICI sector. The decision concludes that they did not. A full analysis is set out at paragraphs 56-82, but the Board concluded at paragraph 82 that "we specifically do not make any finding about the responding party's position that this collective agreement represents only a part of the electrical power systems sector". However, in that section, the Board examined the distinction between the ICI and electrical power systems sectors in a way that was heavily relied on by the

parties favouring a conclusion in this case that the work is in the ICI sector. Certainly, the analysis in that decision points strongly to the conclusion that the electrical power systems sector was, for the period of time relevant to that decision, synonymous with the work performed under the EPSCA collective agreement. There was, however, no final decision on the point.

23. In *Leo Alarie*, the Board dealt with a sector dispute about two "wind farms". This was essentially a windmill and generator facility that produced electricity for the provincial transmission grid. The Board concluded that those projects were in the electrical power systems sector. SNC-Lavalin and Sithe-Global urged me to read the decision as an isolated case determined by the specific nature of the construction work on the wind farm, particularly those details set out at paragraph 27 of the decision. Those facts clearly had a strong influence on the decision of the Board in that case, but it is not the entire basis of the decision. That panel of the Board disagreed with the views expressed in *Ontario Hydro '05* and concluded that the electrical power systems sector "goes beyond construction on what was once the property of Ontario Hydro" (at paragraph 20). In the end, at paragraph 31, the Board concluded that the end use pointed to the electrical power systems sector. So too did the Board's conclusion that the only distinctive work characteristics on this new and at the time unique project that related to any sector was the fact that it was, in the Board's view, undertaken at the behest of the Government (as distinct from private sector initiatives approved by the Government), monitored by the Government and are closely regulated by the Government. There were, in the Board's view, no relevant bargaining patterns in Ontario, although it appears to rely on a history of bargaining patterns developed elsewhere. However, the Board did indicate the very narrowly-defined limits within which it made its decision at paragraph 30:

> 30. We are not dealing with co-generation projects where different considerations may well apply. *Nor are we dealing with the construction of large, industrial steam plants where the steam is used to drive electric generators and where the nature of the mechanical, electrical, and structural work associated with those kinds of facilities is analogous to large industrial plants where steam is used in the manufacturing process.* A co-generation facility being constructed together with or as part of an industrial installation and a large industrial steam generation plant are, in our view, significantly different from the projects in question before us. The projects before us involve the construction of facilities that are "stand alone" electric generators powered by the wind and transmission lines. *(We do not purport to decide in this case whether a privately owned thermal electric generating plant is in the electrical power systems sector. We only note that the construction of that kind of a facility is significantly different from the wind farm projects before the Board in these two cases.)* There is no "mixed use" issue before us with these projects.

Electricity Act 1998 and Subsequent Legislation

24. In *Leo Alarie*, the Board concluded that even if the electrical power systems sector was at one time congruent with the work performed by or for Ontario Hydro, that was no longer the case after the passage of the *Electricity Act* in 1998 (and many subsequent pieces of legislation and regulatory changes). These changes were intended to shift the production of electrical power from Ontario Hydro to primarily private enterprise.

25. There had always been some private enterprise power generation, but it did not supply a large part of Ontario's needs. The goal was to reduce Ontario Hydro and its successors to roughly

one-third of the supply market. To effect this change while continuing to supply the Province's need for electrical power, the Province under successive governments set up various regulatory bodies, including the Ontario Power Authority ("OPA") and the IEMO (Independent Electricity Market Operator), now the IESO (Independent Electricity System Operator) to oversee and supervise this market transition. The desired result is that there are many more parties who are and may be considering the construction of power generation facilities in the future, and this work will be regulated by bodies independent of Ontario Hydro. It is beyond the scope of this decision to attempt to summarize the legislative changes and the several volumes of documents provided to the Board by the parties about the plans and intentions of the Ontario Power Authority. However, these legislative changes do mean that on and after 1998 the nature of the electrical power generation market in Ontario has changed, both from a financial and commercial point of view. The results of those changes on this Project are dealt with to some extent below.

26. In *Leo Alarie*, the Board concluded that the Windfarm projects were undertaken "at the behest of" the Provincial Government. The Board was dealing with a different Request for Proposal from the one in this case. It was a Request for specific types of "renewable" energy production (i.e. wind and solar power) which was to be constructed "based on established principles" (paragraph 24), apparently a close regulation of the details of both the design and the construction of the projects. This project was built under a Request for Proposal dealing with "Clean Energy" that is not particularly prescriptive in terms of design or construction techniques.

27. In any event, I do not read the Request For Proposal under which the Goreway Project was constructed as a procurement or requisition of any particular project. The Government had certainly taken steps in deciding to open the electrical power production market to private enterprise. Something dramatic was required to open the market and to direct it towards "cleaner" sources of energy to create the electricity. The product ultimately would have to be transported along the Hydro One transmission grid and was therefore still subject to a very high degree of regulation. Thus, the form of a Request For Proposal as a means of opening and encouraging a market to develop is not something I would characterize as requiring or initiating a process that leads to the construction of electrical energy producing plants, and specifically not the Goreway Project.

Some Definitions

The Provincial Collective Agreements

28. Some of the parties referred to the provincial collective agreements as the "ICI agreements". For different reasons, the Labourers/Operating Engineers and the IBEW referred to them as the provincial collective agreement (or in the case of the IBEW the Principal Agreement) which in this case is its proper name). It is appropriate to refer them as "ICI agreements" for the following reasons.

29. First, whatever else they may be, provincial agreements are all the "provincial collective agreements" required by section 162 of the Act. That is, each is bargained by agencies that, whatever else they may also be, are the designated employer and employee bargaining agencies for one bargaining relationship. Any employer who is bound to this agreement is bound at least in the ICI sector. There are no exceptions. Some of these agreements purport to cover more than the ICI sector. The extent to which they actually do in any one bargaining relationship will vary among employer parties. For example, both the Labourers and the IBEW provincial collective agreements make

explicit provision for non-ICI sector work. However, many employers are bound to such collective agreements only because they have been certified by the union and the Act binds them by operation of law to that agreement. That same employer is not bound to it as a collective agreement outside the ICI sector unless the employer (a) is or becomes a member of the organizations that bargain on behalf of employers to extend the scope of the provincial collective agreement to include non-ICI sectors or (b) agrees in writing to be bound (for fuller discussion see *SNC-Lavalin*, *supra*). Thus, when an employer performs work under the collective agreement, it is always appropriate to refer to it as a collective agreement binding on that employer in the ICI sector. It is only sometimes appropriate to refer to it as a collective agreement binding in non-ICI sectors, and that determination requires additional facts to substantiate it. In this case, no such facts were pleaded and no evidence was filed. Hence, the only sector one can say with certainty that the provincial collective agreements applied to on this Project is the ICI sector.

30. I do not mean to overstate the point. It is likely that most contractors bound to the IBEW principal agreement are members of the Electrical Contractors Association of Ontario or a constituent body of that organization. This is likely true for many mechanical trade contractors. That observation tends to be less common among civil trade contractors. However, the fact remains that the parties (except in submissions by counsel for the IBEW) did not advert to any fact that would enable the Board to conclude that the reach of the collective agreements extended beyond the ICI sector in respect of anyone working on these projects.

31. Second, these agreements essentially define the ICI sector. By virtue of section 162, there are no other collective agreements binding on the designated building trades unions in the ICI sector of the construction industry. The only non-designated union is the Christian Labour Association of Canada whose collective agreements differ from the provincial collective agreements in many ways. Thus, these agreements define ICI bargaining. Other than the IBEW's agreement (and perhaps certain portions of the Operating Engineers' Agreement), to the extent they apply to non-ICI sectors, they do not typify bargaining in that sector. Indeed, Article 1.04 of the Labourers' agreement invites contractors to sign other agreements developed for specific work in specific areas outside the ICI sector:

> "This Agreement shall also apply to an employer in all other sectors where the Union or any of its affiliated bargaining agents have bargaining rights in such other sectors for the employees of such Employer, *provided that such employer may become signatory to the various Collective Agreements applicable in such other sectors*".

The provincial collective agreement (if it applies at all) outside the ICI sector is only a default position that applies if it is not displaced by a local other sector collective agreement.

32. For these reasons, when the parties referred to the provincial collective agreements as applied to this particular Project, I have treated that as an application of an ICI sector agreement to the Project being referred to.

"Broader Electrical Power Systems Sector"

33. Although nothing turns on it, the phrase "broader electrical power systems sector" is interesting. It is a phrase that has been used only recently, and most frequently by the Labourers/Operating Engineers and other parties interested in arguing that work divorced from

Ontario Hydro falls within the electrical power systems sector. The phrase is taken, presumably, from the phrase "broader public sector", which refers to workplaces that are not *really* public sector (and governed by CECBA or the *Public Service of Ontario Act*) but share many characteristics with it (including a greater or lesser degree of public funding). I do not mean to thus suggest that the term "broader electrical power systems sector" should be taken to refer to projects that are not *really* electrical power systems projects. The phrase is indicative, perhaps, of the fact that those who use it find the Project being discussed is a somewhat uncomfortable fit with the electrical power systems sector. However, I draw no conclusions from the parties' use of the word. This is a sector dispute. The work is in the electrical power systems sector or it is in the industrial, commercial and institutional sector. There is no need to elaborate the terms beyond their statutory wording.

The Three Factors

End Use

34. The Labourers/Operating Engineers argue that the end use is the production of electrical energy, and that use points squarely to the electrical power systems sector. That argument would have more force if the sector were simply the "electrical power sector". The word "system" must have some meaning, and clearly refers to a larger connected set of elements.

35. One can view it from a different perspective. As the IBEW argued:

> 18. Clearly an "end use" analysis would strictly characterize the construction of electrical power plants as EPS sector construction. However, just as the Board determined that the EPS sector included (ICI-type) office buildings at generating stations, roads, sewers and watermains and (Heavy Engineering) hydro electric dams; so too the ICI sector encompasses all aspects of an industrial, commercial or institutional enterprise including any necessarily incidental electric power plant to feed the heavy industrial process or potentially used as a commercial enterprise selling its power in the market.

36. Sithe-Global placed a great emphasis on what it sees as the effect of the market economy in which the Goreway Project operates. It delivers its electrical energy to the physical grid, the transmission system operated by Hydro One. It is not, however, simply producing power to add to a pool of power that Hydro One then utilizes. It sells, hour by hour, specific quantities of electrical power to specific customers who bid on it and are prepared to pay a specific and defined price. One of these customers may be Hydro One, but that is not necessarily the case. The Hydro One transmission system delivers it, and the IEMO (now the IESO) supervises the entire commercial exchange and the introduction of power into the provincial grid. However, this transaction more closely resembles the market exchange of a primary industrial product to a commercial customer than either the generalized production of power by Ontario Hydro to satisfy the general needs of the Province, or the sale of power from a "Co Gen" project to the only available purchaser, Ontario Hydro.

37. There are also facts relating to this particular type of operation that are of significance. The process used is one that creates steam to drive electrical generators. Steam may be an industrial product itself and sold to chemical processors, mines, manufacturers (especially pulp and particleboard manufacturers) and general industrial or commercial customers for heating purposes.

There is no plan to do so with the steam from the Goreway Project and there is no reasonable prospect of finding any such customer in the foreseeable future (even if the profit from the sale of steam were to be higher than the profit from the sale of electricity).

38. However, as SNC-Lavalin puts it, like any commercial market, a power generation project is subject to the winds of change. SNC-Lavalin filed a declaration of Paul Murray, Director of Construction Operations for SNC-Lavalin, setting out the following examples of how the end use of this type of facility can change:

> 10. Currently the waste heat from Goreway's steam-turbine is expelled to the atmosphere using a fin-fan cooling system similar to cooling towers. A cut could easily be made into the water pipeline and a valve installed to provide a heat take-off to a nearby facility, however. That is essentially what happened at Markham Hydro, for example, where the Utility had built a co-generation plant to supplement its own heating and electrical needs. The availability of an economical source of heating spawned new private construction around the Hydro building, to off-take the heat from Hydro's co-gen. The new Portlands Centre has in fact been constructed with a blind-flanged water pipe, to allow more simplified conversion and take-off should such additional users develop.
>
> 11. Another option to utilize a co-gen's waste heat is to use it to run absorption chillers to provide chilled water for cooling purposes which might be a more likely possibility for Goreway, since the Brampton area in which it is located is the hub of refrigeration-warehousing for the GTA. This is actually what occurred at the GTAA Pearson facility; when the co-gen reached a point where it was producing steam in excess of its electricity-generating needs, an absorption chiller was built to replace the electric coolers for the Airport, at least during peak electricity times.
>
> 12. An unfortunate example of "contracted" end-use is the McDonnell-Douglas co-gen, built by Transalta in 1991. With the closure of the McDonnell-Douglas plant subsequently, the power plant is now being operated by Transalta strictly to produce electricity for commercial sale into the market.
>
> 13. Having been directly involved in the construction of both the GTAA and the Goreway power projects, I can advise that the two are virtually indistinguishable from a construction point of view. The engineering and design are virtually identical, as are the construction methods and trades used.

39. One can make too much of such changes. After all, the decision to build a particular project, and the choices made on that project, are predicated on what one knows at the time of construction. Certainly, a choice about sector for the purposes of the Act must be made at that time. It does, however, suggest that the materials used and the methods of construction are not unique to the electrical power systems sector and indeed, that the use that can be made of them does not point to a single end use.

40. In the end, all of these considerations tend to lead to the conclusion that the end use is similar to the end use of an electrical power systems project, but that conclusion is subject to a number of significant qualifications.

Work Characteristics

41. There are a number of issues that arise in this case in ways that have not arisen in previous decisions of the Board. I have grouped these issues, for convenience, under the general heading of Work Characteristics. Some of them certainly go beyond the work characteristics enumerated by the Board in the *Heavy Construction Association of Ontario* decision, but even that list was never treated as exhaustive. In analysing the issue of sector, all parties have emphasized and relied on different aspects of all of these issues in their argument for or against particular positions.

Regulatory Framework

42. The production of electricity is a heavily regulated activity. Much of this regulation is new, introduced as part of the privatization of electrical power generation in Ontario. It consists of two different types of regulation: the control and selection of those who enter the market at all, and the regulation of the design of the project, and its actual construction.

(i) Market Entry

43. Unlike many products, the ability to enter the market for the sale of electricity requires more than simply a business calculation that there is a potential profit to be made. Entry into the market requires the consent and support of the Ontario Power Authority. Part of that approval is based on an assessment of market need in the area into which the producer intends to sell. While it is theoretically possible to make a proposal to the OPA to approve the expansion of a particular quantity or location of supply of electricity (and this may well happen informally), the actual opportunity to enter the market comes when the OPA issues a Request for Proposal to supply a defined quantity of electricity in a specific geographic area.

44. In September 2004 the Ministry of Energy issued a Request For Proposal for 2500 MW of "new, clean generation and Demand-Side Projects". It invited those "proponents" who had submitted a statement of qualifications to make proposals to build facilities that would supply the needs of Ontario. The Request For Proposal states that it "is intended to contribute to the Government of Ontario's stated objective of replacing coal-fired generation – addressing future supply challenge and mitigating near term reliability concerns in priority areas of the Province". The projects were to be "demand response projects":

> 2. *Demand Response Projects*
>
> The ability for consumers to reduce their consumption of electricity in response to high prices or system shortages is a key feature of Ontario's market and future electricity supply and demand equation. Demand response capabilities help to cost-effectively achieve a balance of supply and demand by reducing the need for high priced supply during peak demand periods, or by reducing the need for supply during periods when supply is limited. To be effective, Demand Response Projects must be able to respond to high prices and to Operational

> Directives issued by the IMO to reduce demand. In particular, for this 2,500 MW RFP, DR Projects must:
>
> a. be able to curtail at least 5 MW of load located in Ontario, which may result from aggregating multiple loads; and
>
> b. be able to curtail load located in Ontario for a period up to 6 hours at a time, between the hours of 8 a.m. and 8 p.m. as directed by the IMO.

Ontario Power Generation is effectively excluded from the process:

> ... Ontario Power Generation Inc. (OPG) shall not be permitted to participate either as a Proponent or as the sole member of a Proponent Core Team in this 2,500 MW RFP. Moreover, if OPG is not the sole member of a Proponent Core Team, then OPG shall be deemed not to be a Proponent Core Team member. In addition, OPG shall not be permitted to Control a Proponent. OPG shall however be permitted to participate as a member of one or more Proponent Non-Core Team(s), subject to the non-collusion restrictions set out in Section 111.G.

45. The Request For Proposal was not one designed to elicit a single response to provide all 2500 MW from a single source, but rather from a number of sources supplying specific demand areas. The Request For Proposal identified the type of contract the proposal would be required to enter into with the Ontario Power Authority. In the case of the Goreway Project, this was a "Clean Energy Supply Contract", the form of which was fixed by the Ministry of Energy. The actual contract was with the Ontario Electrical Financial Corporation, but would ultimately be transferred to the Ontario Power Authority. The Ontario Power Authority had the authority to issue final approval for a project.

46. In April 2005, the Independent Electricity System Operator (formerly the IEMO) which is responsible for matching supply and demand in Ontario, formally advised the Ontario Power Authority of an "urgent" need for a new supply of at least 600 MW (and likely more by 2010) of electrical power in the western Greater Toronto area through a specific point: the Claireville Transformer Station. It identified two Sithe-Global projects as, together, fulfilling that need and providing room for expansion. One of the projects was the Goreway Project (as it was ultimately named). The Ontario Power Authority gave its consent and the Project went ahead.

47. Market entry approval is not a common feature of commerce in Canada. The open market (subject to regulation as to the manner of carrying on business and product quality) is taken to be the norm. However, market entry is controlled in a number of areas of the economy. Market entry restrictions on producers of eggs, milk and poultry are a common feature in most Canadian provinces, and certainly in Ontario. The supply of natural gas is another regulated economic activity that is directly related to the Goreway Project. To make this Project possible, Enbridge Gas Distribution Inc. was required to apply to the Ontario Energy Board for leave to construct 6.5 km of 24-inch natural gas pipeline to the Goreway Project from the gas transmission system of Trans Canada Pipeline Limited. (Interestingly, the application was the result of a compromise between competing applications filed previously by Sithe Canadian Pipelines Limited and Enbridge.) The Ontario Energy Board, in its decision dated July 10, 2006 (decision No. 2005-0539) identified the issues as:

- Is there a need for the proposed project?

- Is the proposed routing of the pipeline appropriate and are there any environmental safety or landowner concerns?

- Is the project economically feasible?

After examining these issues, the Ontario Energy Board concluded that the Project was "in the public interest" and granted leave to construct the pipeline.

48. The construction of such institutions as hospitals, colleges and universities are also the subject of a less formalized approval process. However, these projects are distinguishable because part of the approval process relates to the availability of public monies to fund the construction and the ongoing operation of these institutions. Nursing homes are a more apt analogy since they are profit-making enterprises (though they may receive public funding as well). At one time the Province of Ontario was actively encouraging the construction of such facilities to meet a perceived public need.

49. Thus, while the particulars of the approval of market entry are not common features of an industry in Ontario, they are found in areas where the Government has identified a "public interest" that requires such close regulation. This market entry regulation is found outside the construction industry and in the pipeline, ICI and/or residential (depending on one's view of a particular nursing home) sectors.

50. SNC-Lavalin, in its reply submissions, relied on certain statements from the Ontario Power Authority to suggest that this was merely a transition phase designed to move Ontario from a public monopoly to an open market. Whether that will prove to be true, or whether the Ontario Power Authority will demonstrate the resilience of the *Temporary Wartime Income Tax Act* of 1917 remains to be seen, and will be determined by governmental perception of the public interest.

51. For purposes of this decision, however, it was the regulatory regime under which this Project was constructed. In the end, it does not point uniquely to any one sector.

(ii) Construction of the Project

52. The actual details of the construction are also closely regulated by the nature of the regulatory controls under which it was built. These controls include the clean energy supply contract itself, and the Connection Assessment and Approval Process (which governs the connection to the physical grid).

53. The clean energy contract provides in general terms that Sithe-Global is required to design, build and maintain the Project using what it calls "Good Engineering and Operating Practices", which are defined as:

> "**Good Engineering and Operating Practices**" means any of the practices, methods and activities adopted by a significant portion of the North American electric utility industry as good practices applicable to the design, building, and operation of generating facilities of similar type, size and capacity or any of the practices, methods or activities which, in the exercise

> of skill, diligence, prudence, foresight and reasonable judgement by a prudent generator in light of the facts known at the time the decision was made, could reasonably have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety, expedition and Laws and Regulations. Good Engineering and Operating Practices are not intended to be limited to the optimum practices, methods or acts to the exclusion of all others, but rather are intended to delineate acceptable practices, methods, or acts generally accepted in the North American electric utility industry.

54. The connection agreement is based on the Connection Assessment and Approval Process. That process requires a report from the IEMO "for the purpose of assessing whether the applicant's proposed connection to the IMO-controlled grid would have an adverse impact on the reliability of the integrated power system and whether the IMO should issue a notice of approval under ... the Market Rules". It essentially means that the supply of power to the physical grid will not endanger the integrity of that grid and will integrate with it.

55. There are also regulatory approvals required under the *Ontario Energy Board Act*, but only for the construction of the electrical transmission or distribution lines and for making the interconnection with the Hydro One transmission system. Approval must also be obtained under the *Environmental Assessment Act* having regard to the impact on the surrounding environment.

56. The fact of regulation itself is not a unique feature of the electrical power systems sector and only some of the specific regulation is. The definition of good engineering and operating practices is so general as to be unhelpful for the purposes of this decision. There are a multitude of codes: the American Society of Mechanical Engineers (A.S.M.E.) Codes (all 600 of which potentially apply to work in all sectors of the construction industry), the Technical Standards and Safety Authority (TSSA) Codes, Welding Codes, Building Codes, and so on, that could all be described as sound engineering practices, and many of which will no doubt be used on this Project. Indeed, even the definition does not limit itself to "optimum practices to the exclusion of all others". They are to be those codes that have been adopted by a significant portion of the North American electrical utility industry. That certainly points to the electrical power systems sector, but not exclusively. As will be seen, there is no dispute that a "Co Gen" that produces electricity is in the ICI sector. While such facilities are not really a "utility", there is no reason to assume that the same practices and codes would not apply to these facilities as well. I note as well that the Ontario Energy Board, in granting approval to Enbridge to bring the supply of gas to the Project, required proof of compliance with the relevant TSSA codes.

57. The *Environmental Assessment Act* is a common feature of every construction project. It is impossible to imagine an industrial project of any significant size (much less one the size of the Goreway Project) that would not require approval under that Act.

58. The connection agreement and the approval process are uniquely electrical power systems sector requirements. They relate to the connection and the operation of the physical power grid and are integrally connected with its operations. They have no counterpart in any other industry.

Construction Issues

59. In 1973 the Board said in the *Heavy Construction Association of Toronto* case at paragraph 16:

> 16. However, if we try to define the heavy engineering sector in terms of the emphasis of engineering problems and the use of large scale equipment, we are confronted with the problem that these two characteristics are not sufficient to distinguish projects which clearly fall into the other enumerated sectors. Thus, for instance, the construction of a large refinery, steel mill, power station or sewage settling basin may have these same characteristics. We are thus faced with the potential conflict that any project in any of the other sectors can arguably be placed in the heavy engineering sector if the problem is an engineering problem and the equipment used is large scale or heavy equipment. ...

Certainly, Prof. Ellis did not see any discernible difference between the work characteristics of the electrical power systems sector (as it existed in 1977) and the ICI sector. In *Leo Alarie*, the Board did rely on the new technologies being developed to a considerable, but not a determinative degree (see paragraph 27). It is therefore necessary to examine the specific work characteristics in some detail. The first attempt to list them came in the Board's decision in *Heavy Construction Association of Toronto* at paragraph 14:

> 14. ... The work characteristics which distinguish one sector from the other sectors of the construction industry may be shown in terms of the type of problems to be dealt with at the job site, the types of solutions resorted to at certain job sites, the material used, the relative importance of various specifications, the variety of skills and trades, and certain characteristic relations with employees. This list of characteristics is not to be thought of as exhaustive, but as examples of particular characteristics which differ between the various sectors enumerated in the Act.

60. In examining this Project, I find it helpful to break the Project down into three portions: the steam generating plant, the electrical power-producing generator, and the connection to the physical grid.

61. As described, the steam generating plant consists of various components that produce steam that is controlled in a manner that creates and maintains high pressure. At its maximum, the plant is a combined cycle plant. That is, there are three gas turbines that burn natural gas to heat water and convert it to steam. The exhaust and waste gas is routed through a HRSG to heat water and create steam. The steam is then directed to the Electrical Generator under pressure.

62. There are no work characteristics that point exclusively to the ICI sector or the electrical power sector in this phase of the operation; they are common to both. Steam is a common form of energy used in many primary industries: electrical power generation, pulp and paper and wood manufacturing (particle- or strand-board or plywood), chemical production, mining in some cases, and the heating of commercial and institutional buildings in urban areas. A HRSG is simply a function of the size of the project. If there is any sizable amount of waste heat, it is usually economic to construct a boiler or heat exchanger to capture that heat for more steam production. The construction issues will not vary with the use made of the steam. The source of water and fuel must

be secure, the steam turbine must be maintained at peak capacity, and the steam must be kept under maximum pressure and the exhaust products must be safely expelled or disposed of.

63. The electrical generator has a more specific function. It converts steam under pressure into electrical energy. The technical requirements of such a generator and the construction issues to which it gives rise will be basically similar across all such electrical generation. Certainly, the generation of electrical power is a basic element of the electrical power systems sector. It is not unknown in the ICI sector, however. There is no dispute that, at least the Co Gen facilities (that use steam for industrial uses and the production of electricity) are in the ICI sector. They do not switch sectors when the steam is diverted from an industrial use to an electrical power generating use. The construction of a Co Gen is obviously a single project. Thus, the work characteristics of a generator to produce electrical energy are more commonly found in the electrical power systems sector. They are also found to a significant degree in the ICI sector.

64. The final phase is the connection to the physical grid. This involves delivering the electrical power generated to the physical structure that makes up the transmission and perhaps distribution systems in Ontario. The work characteristics are therefore by definition identical to those of the transmission system work in the electrical power systems sector. That is also the only place where such work will occur. While the work may be described functionally as the interface between the generator and the grid, the work characteristics of this portion of the Project are exclusive to the distribution and transmission of electrical energy. Such work is performed only on the physical grid or at its interface. I have no evidence to suggest that the skills and construction techniques are found elsewhere in the ICI sector, despite the fact that large amounts of electricity are used in virtually every industrial and commercial use. It is also worth noting that Hydro One itself is involved in both the supervision of the work and the performance of some of the work with its own employees. Thus, the work characteristics of this phase of the Project point exclusively to the electrical power systems sector.

Bargaining Patterns

The Effects of Deregulation: Funding, Business Models, and Collective Agreements

65. There was considerable discussion about the nature of private enterprise as opposed to publicly-funded electrical generating companies. These issues do present fundamental and significant issues for producing companies changing from a market that was previously barred to them. Public funding is not, per se, the issue. The residential sector is characterized by both public and private funding. The question for the Board is not the fact that the economic and business model has changed, but what effect this has on the construction industry that builds these structures.

66. The significant factor since 1971 for the electrical power systems sector is the presence of Ontario Hydro. Prof. Ellis identified the fact that Ontario Hydro was the one and only owner and constructor in the sector and that this was the electrical power systems sector's most significant distinguishing feature. In 1978 he concluded that this impacted on labour relations in the following ways:

> (1) The bargaining structure between EPSCA and the Ontario Allied Construction Trades Council was different from bargaining structures in the ICI sector;

> (2) Province-wide, multi-trade bargaining was the norm in the electrical power systems sector, but was not in 1977 typical of the ICI sector (although he expected it would become so);
>
> (3) The public interest was more directly engaged in strikes in the electrical power systems sector than in the ICI sector given the importance of energy supply (although he discounted that factor).

Prof. Ellis recommended that the electrical power systems sector remain separate from the ICI sector, not because Ontario Hydro deserved a "special deal", but because the bargaining structures and collective agreements that had developed under Ontario Hydro's regime were different from the bargaining structures of the ICI sector, and were more appropriate, for various reasons, to Ontario Hydro's dominant position in the sector. He also identified certain negative effects of adding Ontario Hydro to ICI bargaining, not the least of which was that the customer and the contractor would be required to negotiate at the same table together.

67. All of this has changed since 1978, of course, even before the decision to end Ontario Hydro's monopoly and to privatize power production. Whether the Legislature intends to re-visit that issue may be (or may not be) an interesting (or academic) issue, but is not one before the Board to decide. The question in this case is whether the change from a public monopoly to a public-private mix has any impact on the definition of sector.

68. While it is still too soon to see (or to wish to predict) whether there will be many or any changes, or whether things will remain the same, there is one significant effect. The collective agreements applied on this Project are the ICI collective agreements, not the EPSCA or, for the most part, "EPSCA-style collective agreements". There are two primary distinctions between the two types of collective agreements. The typical ICI agreement contains two fundamental concepts related to the basic job security concerns of craft construction unions: a definition of trade jurisdiction and a subcontracting clause. Work that is the "work of the craft" is identified in greater or lesser detail and an exclusive claim is made to it, with grudging, if any, reference to jurisdictional disputes. The employer must hire only union members to perform this work and further, if some or all of the work is contracted or subcontracted to others, they too must be in similar or identical obligations to the union and its members through a collective agreement.

69. Neither of these features is present in the EPSCA collective agreements. There are few work jurisdiction provisions, but there is a detailed process for dealing with jurisdictional claims and resolving or litigating disputes about work assignment. There is also no subcontracting clause of the type found in ICI collective agreements. Rather, the entire structure of the EPSCA collective agreements was based on an unwritten understanding that, while the contractor bound to no collective agreement or to different collective agreements outside the electrical power systems sector might bid on and receive work from Ontario Hydro (or other EPSCA members), those contractors would hire only from the hiring halls of the local unions persons to perform work falling within the various craft bargaining units. The only assurance that unions had, and which they were prepared to rely on, was the "labour requirements clause" between Ontario Hydro and its contractors that enforced this obligation as part of the commercial agreement between them. It was not a direct contractual agreement with the unions at all. So long as Ontario Hydro was the source of all work, and the Building Trades Unions were prepared to accept the arrangement, it provided all of the security with respect to work jurisdiction, union membership and subcontracting practices that ICI collective agreements provided.

70. When private enterprise began to build electrical generating facilities, the collective agreements used were ICI agreements, not EPSCA or EPSCA-style collective agreements. With no one source of work controlling the written and unwritten understandings that underlay the EPSCA collective agreements, they were obviously not acceptable at least to the union parties involved in the construction. As set forth in greater detail below, the ICI agreements had been used for many years in the building of Co Gens, and continued to be used for projects where the sole purpose of the project was to produce electrical power for sale.

71. The Brighton Beach Project is a good example. This was an equal partnership between ATCO Power Canada and Ontario Power Generation Inc. ATCO wished to have the job performed under ICI agreements, OPG wished to have it done under EPSCA agreements. The compromise among the two partners and the trades was ultimately to enter into 15 independent collective agreements with Brighton Beach which (as will be seen) avoided the question of sector entirely. None of the agreements was an exact copy of the EPSCA or the ICI agreements. According to counsel for Sithe-Global, trades were offered the choice of an EPSCA-style collective agreement and a "ICI-style" collective agreement. All but the Labourers chose an ICI-style agreement. The only copy of a collective agreement binding on Brighton Beach was submitted by the Labourers/Operating Engineers. The collective agreement is between the Iron Workers and Brighton Beach. This is clearly an ICI-style collective agreement in all respects other than the scope of the bargaining unit description. That bargaining unit defines a unit of employees engaged in construction and maintenance on any "natural gas fuelled combined cycle power facility" on which Brighton Beach is engaged. That is, it does not attempt to define sector.

72. The collective agreements with respect to the wind farms, which the Board did find to be in the electrical power systems sector, are also instructive. The Recognition Clause of the Labourers' collective agreements reads as follows:

> 2.01 The Employer recognizes the Union as the sole and exclusive bargaining agent for a bargaining unit comprised of all employees of the Employer throughout the Province of Ontario in the classifications listed below:
>
> Labourers
> Carpenters
> Painters
> Insulators
> Asbestos Workers
> Plasterers
> Cement Masons
> Truck Drivers
> Iron Workers
> Rodmen
> Such other classifications subsequently agreed to by the parties.
>
> 2.02 The specific provisions set out in this Agreement for terms and conditions of work shall apply to all construction and maintenance work performed in the electrical power systems sector of the construction industry throughout the Province of Ontario save and except work falling within the scope of the collective agreement between the Labourers' International Union of North America and The Electrical Power Systems Construction Association.

> 2.03 Such specific provisions shall also apply to all other work performed throughout the Province of Ontario save and except where the work falls within the scope of the collective agreements listed below in which case the Employer shall abide by and perform such work in accordance with the terms and conditions of the applicable collective agreement...

While focused on the electrical power systems sector, it purports to cover all sectors. Work jurisdiction issues are resolved simply by absorbing the craft jurisdiction of the other civil trades (although the later "crossover clause" refers only to certain Labourers' agreements). There is a typical subcontracting clause. The structure of the collective agreement is common to many sectors outside the ICI sector. The recognition clause is more typical of the heavy engineering sector than either the electrical power systems sector or the ICI sector. I note, however, that it is modeled on the Ontario Hydro Services Company "off property" collective agreement.

73. The effect of the privatization of electrical production facilities in Ontario on labour relations respecting those projects is that the collective agreements used are the ICI or ICI-style collective agreements, and not collective agreements typical of the electrical power systems sector.

Historical Patterns

74. The parties to this application did an enormous amount of work identifying previous projects and attempting to identify one type of collective agreement (if any were used on it). In the end, there were very few conflicts, and I am satisfied that either they can be resolved on the basis of the material filed or that their exclusion from the survey would not materially affect the result.

75. All projects built on Ontario Hydro property by Ontario Hydro or for Ontario Hydro or its successors were built pursuant to the EPSCA collective agreements, once they were in place. That is not a surprise to anyone, nor is the fact that since 1971, when the concept of sector was introduced into the Act, most of the electrical power generating facilities in the Province were built by or for Ontario Hydro. Although the Bruce Nuclear Generating Station is now leased to Bruce Power LP, the land and facility is still owned by Ontario Power Generation and Bruce Power has acknowledged that it is a successor employer under the EPSCA agreements. I have therefore treated it as part of the "Ontario Hydro" family.

76. Turning to private sector production, the pattern is quite different. The parties identified a list of 31 privately-owned and operated projects that partially or exclusively produce power that is loaded onto the transmission grid operated by Ontario Hydro/Hydro One. The list compiled reaches back to 1990. The parties used that as a starting date because of the difficulty in obtaining accurate information that was likely to produce agreement about which collective agreement was used earlier than that date.

77. Of that list, 27 were described as "Co Gens". That is, they were facilities that produced both steam for industrial and heating purposes and to produce electrical power (simultaneously or at different times of the day). The electricity was supplied to a single industrial user (sometimes through Ontario Hydro) or was simply sold to Ontario Hydro for distribution to its customers on the grid. Of that 27, the parties agreed that 21 were constructed under the provisions of the ICI collective agreements. Of the remaining six, the Labourers and Operating Engineers dispute that they were performed under ICI collective agreements, but have put forward no theory as to what collective

agreements were used on them. There were, as all parties acknowledge, Co Gens built before 1990, but no party sought to lead evidence about practice on any of those sites.

78. A smaller number of projects were identified that exclusively produced electricity for sale. One was the subject of agreement: Pottery Power Station constructed in 1990 was a facility all parties agreed were constructed under the ICI collective agreements. Three other electrical production projects: Keele Valley, Brock West Landfill, and Cochrane, were asserted to have been constructed under ICI agreements by most of the parties. The Labourers/Operating Engineers dispute that assertion without putting forward any alternative version of the facts themselves. Given the declarations of Terry Budd and Paul Murray, who in their different capacities, were directly involved in the bidding and/or construction of those projects, and in the absence of any factual allegation to the contrary from the Labourers/Operating Engineers, I conclude that the first two of these projects were bid and constructed on the basis of ICI collective agreements. Two First Nations companies: Five Nations Energy Inc. and Mississagi Energy, built two projects near Attawapiskat, Ontario, involving generation and transmission work servicing First Nations communities and the surrounding area. Work was done under the EPSCA agreement or an EPSCA-style collective agreement.

79. With respect to the Prince Township and Huron Shores wind farms, described in the Board's decision in *Leo Alarie*, the projects were constructed under the agreements described above. The IBEW, although it took the position that the Project was in the ICI sector before the Board in *Leo Alarie*, worked under its Principal Agreement on these projects since the contractors involved were all members of the Electrical Contractors Association of Ontario ("ECAO") and were therefore bound to the portions of the Principal Agreement that cover non-ICI sectors.

80. The Brighton Beach Project came before the Board by way of a subsection 1(4) and section 69 application brought by several parties, but in the end, only by the Canadian Union of Skilled Workers. Its genesis is described in some detail above. The compromise reached between the two operating partners was that the 15 building trades unions would be offered a work specific collective agreement with Brighton Beach. All the trades did agree to one. Each collective agreement refers to a craft bargaining unit and refers to those employees engaged on the construction or maintenance of "natural gas fuelled combined-cycle power facilities" without further reference to sector. Counsel for Sithe-Global asserted that the trades were offered a choice between ICI-style agreements and EPSCA-style collective agreements, and that only the Labourers chose an EPSCA-style collective agreement. Counsel for the Carpenters said that the Carpenters adopted "best of both" collective agreements by adding provisions from the EPSCA agreement into their ICI agreement, but did not elaborate. The only collective agreement in this proceeding was filed by the Labourers/Operating Engineers and was between the Iron Workers and Brighton Beach, which does indeed appear to be modelled on their ICI collective agreement. The Labourers/Operating Engineers assert that the Board should conclude that this was a "broader electrical power systems sector" collective agreement primarily because if it is an ICI sector agreement, it is void pursuant to section 162. The collective agreement, of course, makes no reference to sector at all. It is also not clear whether any other party would have the basis of a complaint, or be able to prove any damages, from relying on agreements that do not provide any economic advantage.

81. In my view, the Brighton Beach is neutral in this consideration. It was obviously a project where parties were uncertain about the sector (not surprisingly) and reached a compromise involving the disparate desires and ambitions of all of the parties (except, of course, for the Canadian Union of Skilled Workers).

82. The Goreway Project itself was tendered and constructed under the ICI collective agreement and all trades at work on the job performed work under their respective ICI collective agreements.

83. The conclusion one draws from this is that when the parties have engaged in the construction of facilities not on Ontario Hydro or Ontario Power Generation property that produced electric power, the predominant collective agreement used is the ICI collective agreement or one that is more similar to the ICI collective agreement than it is to an EPSCA collective agreement. This is perhaps less surprising on Co Gen projects, which have at least one use for an industrial process or heating. However, even among the straightforward power producers, the use of the ICI agreement is the most common response. In most of the projects listed, the issue of sector did not arise at all. On Brighton Beach, a project physically similar to the Goreway Project, when the option was offered, most trades opted for an ICI-style agreement.

84. In *Leo Alarie*, the Board considered a very different pattern of bargaining history. The Labourers/Operating Engineers asserted that "new bargaining patterns will develop because of the end of Ontario Hydro's monopoly". The Board considered that argument at paragraph 33 and said:

> We anticipate, based on the collective bargaining relationships that have been created as a result of these two projects, new bargaining patterns will develop and emerge.

Indeed, the Labourers/Operating Engineers state in this case that they "took heed of the Board's decision and [have] established bargaining patterns and collective agreements applicable to the so-called broader electrical power systems sector".

85. In fact, the Board's consideration of the bargaining patters was not as simple as the Labourers/Operating Engineers would have it. At paragraph 27 of *Leo Alarie*, the Board said:

> The speciality subcontractors that erected the turbines had experience doing this kind of construction work in other jurisdictions and sought agreements with the trades that had the work experience and skills those speciality contractors considered best suited for wind turbine erection work. In effect, those contractors arrived in a jurisdiction where this work was being done for the first time and sought to replicate the collective bargaining patterns they had developed elsewhere.

That is, the bargaining patterns that the Board looked at were patterns that had developed outside of Ontario and were related closely to the specific technology associated with the building of the windmills. The Board's task in determining sector is to look at evidence relevant to what is being built, rather than pointing the way to new and different patterns of bargaining rights (or seeking to inhibit the growth of such a pattern). The Labourers/Operating Engineers may well have taken heed of the Board's decision, but it was not one that instructed them or invited them to create new structures out of the air.

86. In any event, the Labourers/Operating Engineers' assertion is hardly borne out by their wind farm agreements. They look more like ICI collective agreements (including subcontracting clauses), direct relationships between the union and the employers without a bargaining agency as mediator during the operation of the collective agreement, and an absence of trust funds such as the

EPSCA Vacation Pay Fund into which benefits are to be paid. The only distinguishing feature is the listing of essentially all the civil trades in the recognition clause (a feature of neither sector). It is interesting to note the similarities between the work done under the Off-property Agreements and the Windfarm Agreements. In the case of Hydro One's Off-property Agreement, the work primarily requires the work of linemen and electricians and operating engineers (all of whom have their own separate collective agreements). Given that some of the work done in constructing a line might be a task that other trades might claim, the recognition clause covers the representation rights for those trades as a way of excluding the possibility of those trades acquiring bargaining rights. Similarly the Windfarm apparently only required labourers and operating engineers from among the civil trades for its construction purposes and so the same strategy was adopted. The work on the Goreway Project, on the other hand, is one that requires the skills and work capacities of virtually all the trades in large numbers.

87. Unions and Employers will, of course, negotiate the collective agreements that are in their own best interests. The preservation of work opportunities in the Windfarm Agreements was accomplished by expanding the scope of representation rights to cover all the civil trades identified by certain names and categories that are found in virtually every other collective agreement in the construction industry. The scope clause indicates on its face an electrical power systems sector focus, but does not limit itself to that sector.

88. Accordingly, I conclude that the collective agreement used on this Project by all employers and trade unions, that is, the ICI collective agreement, is consistent with the pattern of collective bargaining that has been applied to most of the projects for the generation of electrical power constructed by owners or contractors other than Ontario Hydro across the Province.

Conclusion

89. I conclude that the bargaining patterns point very strongly to the ICI sector. Work characteristics, where they distinguish between the ICI and the electrical power systems sector at all (and some do not) also indicate, if not quite as strongly, that the work falls in the ICI sector. The only exception to that pattern is the construction of the connection to the grid operated by Hydro One. The end use factor tends to point to the electrical power systems sector, but even that is equivocal for many reasons.

90. For these reasons, I conclude that the bulk of the Goreway Project falls in the ICI sector of the construction industry. I draw no conclusion about the part of the project dealing with the connection to the physical province wide electrical grid, which was not set out in much detail in the evidence and to which very different considerations may apply. Barclay did not work on that part in any event.

91. Since the persons whom the Carpenters seek to represent in this application were already covered by the subsisting ICI agreement which is not in the open period (assuming that even at that time they can displace themselves, an issue the Board has not yet determined), this application is dismissed as untimely.

2082-07-R International Union of Operating Engineers, Local 793, Applicant v. **Carman Construction Inc.**, Responding Party

Certification – Construction Industry – Reconsideration – The union sought reconsideration of an earlier Board decision allowing the late filing of a response to one of two applications for certification delivered to the employer on the same day – The Board confirmed that the responding party had a legitimate reason to substantiate the late filing of its response when union counsel's cover letters to the two applications for certification were remarkably similar and the courier packaging of the two applications was virtually identical – The Board further held that the delay caused by the late filing was only two days, and not eleven days as asserted by the applicant: the union could have acted on the late filing as soon as it was received--late on a Friday afternoon of a long weekend--rather than waiting until the following Tuesday – Finally, the Board confirmed that it was not ascribing any responsibility to the applicant for the employer's confusion although it did indicate that had the union been clearer about its delivery of the two application packages, such clarity would have gone a long way to undermining the legitimacy of the employer's excuse for its confusion – Reconsideration request denied

BEFORE: *Lee Shouldice*, Vice-Chair.

DECISION OF THE BOARD; March 3, 2008

Introduction

1. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c. 1 as amended (the "Act"), that the applicant opted to file pursuant to section 128.1 of the Act. On October 26, 2007, I advised the parties by way of "bottom-line" decision that I would exercise my discretion pursuant to section 128.1(3) of the Act to consider the late-filed information contained in the response of the responding party that was filed with the Board on October 5, 2007.

2. My reasons for that decision were released on January 8, 2008. As a result of correspondence filed by counsel for the applicant dated November 6, 2007, it was anticipated that the applicant would request reconsideration of the above-referenced decision. Accordingly, the reasons for decision dated January 8, 2008 indicated that the Board would entertain a request for reconsideration of those reasons before proceeding with any hearing in this matter, should the applicant desire to do so.

3. Counsel for the applicant delivered a Request for Reconsideration in accordance with the Board's Rules of Procedure. This decision relates to the applicant's Request for Reconsideration.

Exercising the Board's Right to Reconsider its Decisions

4. The principles which the Board applies in an application for reconsideration are set out in *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096, as follows:

> The Board exercises its jurisdiction under section 95(1) [now 114(1)] of the Act to reconsider and vary or revoke any decision with care and

caution in order not to undermine the finality of its decisions and, as stated by the Board in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320:

> Generally, the Board will not reconsider a decision unless a party proposes to adduce evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously.
>
> These are general standards which the Board has developed as guidelines and which are useful not just to guide the Board in making its decisions, but also to allow parties who may be affected by the Board's decisions some degree of certainty of what to expect from the Board. While it is important for the purpose of certainty that these standards generally be adhered to, it is equally important that they not be followed inflexibly.

5. In *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185, the Board stated at paragraph 4:

> To avoid abuse of the reconsideration provision and bring some finality to its adjudicated decisions the Board has adopted principles not unlike those of the courts. The Board will not normally accede to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the case. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or to make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of the party's conduct, and the resulting prejudice to another party if the case is reopened.

6. The Board may also reconsider a decision if an obvious error has been made or if the request raises significant and important policy issues which have not been given adequate attention or consideration. See, for example, *Toronto Board of Education (Plant Operations)*, [1998] OLRB Rep. Jan./Feb. 104.

7. The applicant asserts that the prior decisions in this proceeding involve significant issues of Board law and policy. It is asserted that the prior decision demonstrates a "serious misapprehension of the relevant facts and relevant factors and [is] a significant departure from the Board's jurisprudence".

The Substance of the Request for Reconsideration

8. For ease of reference, the substance of the applicant's Request for Reconsideration will be dealt with under headings that reflect generally the issue raised by the applicant in its Request. The circumstances surrounding the filing of the application, the delivery and filing of the late response, and the responding party's request that its late-filed information be considered by the Board are set

out in the decision dated January 8, 2008, and will not be repeated, except to the extent necessary, in this decision.

The Content and Appearance of Applicant Counsel's Covering Letters

9. In the Request for Reconsideration, the applicant states that, based on the Board's observations and findings set out in paragraphs 27, 28 and 30 of the decision dated January 8, 2008, the content and appearance of counsel's covering letters that accompanied the industrial application package and the construction application package delivered to the responding party on October 1, 2007 appeared to have played a significant role in the Board's decision to exercise its discretion to consider the late-filed information. Building on that foundation, counsel asserts that, contrary to the responding party's assertions and the Board's observations at paragraph 27 of the decision, the covering letters and the Board forms for the two applications for certification were clearly distinguishable from one another. Counsel notes that the forms contained in each package are the forms established by the Board itself, and are distinct as between the construction industry and industrial applications for certification. It is also asserted that the covering letters clearly reflect reference lines for the two applications that are different, that the bodies of each letter are completely different, and that each makes reference to completely different forms as well.

10. The applicant goes to considerable lengths in its submissions to note that the forms that are delivered to a responding party in an industrial certification application are quite different from those that are delivered to a responding party in a construction application for certification. However, the decision of January 8, 2008 did not suggest that the forms were the same. The observation made in the January 8, 2008 decision regarding the materials delivered to the responding party on October 1, 2007 was that the covering letters appeared to be quite similar, and that in the haste to respond to the application for certification the responding party might reasonably have concluded as a result of that similarity, and as a result of having received the hard copy of the same application that had been delivered to it by facsimile the prior Friday, that both packages were a hard copy of that first application and were identical in substance.

11. In that regard, it is not accurate to assert that the two covering letters to the certification applications are considerably different. In fact, they present at first glance to be very similar. The dates on the letters are the same, the shape and content of the addressee and address are the same, and the reference line is identical in shape and size (save for the reference to "(Industrial)" in one, and to "(Construction Industry)" in the other). Of the three following paragraphs, the first and third paragraphs are identically worded. The second paragraphs both commence with the words "Enclosed please find:" and follow with four points numbered 1 to 4. Although the substance of those numerical points 1 to 4 are different, they each contain similar words and each item takes up exactly the same number of lines on the page (item 1 takes two lines, and items 2 through 4 take up one line each) as its comparator in the other letter. The signing lines in each letter are identical. In these circumstances, it was determined that it was a reasonable error for the responding party to believe upon opening up the courier package that these two packages were identical, copies of the materials delivered the prior Friday. There is no reason identified by the applicant to reconsider that determination.

12. The Request for Reconsideration notes that had the responding party taken the minimal time necessary to actually read the content of the covering letters in each package, as well as the accompanying material, it would have been clear that the packages related to separate applications

before the Board. The applicant asserts that the responding party's failure to actually read the covering letters and Board notices that it was properly served with cannot form the basis of a "legitimate reason" for a delay in filing a response. It asserts that its position is supported by Board jurisprudence on the issue that was in existence prior to this proceeding.

13. There is no dispute that had the responding party properly read the packages sent to it on October 1, 2007, it would likely have discerned that there were two separate applications for certification to be responded to at the same time. The decision dated January 8, 2008 (at paragraph 27) clearly agreed with the applicant's assertion that the failure by the responding party to file a timely response to this application was at least in part the result of its own behaviour. The responding party did not read the packages sent to it as it should have. However, it appears to have done so as a result of the similarity in appearance between the two envelopes it received on October 1, 2007, and the fact that it had received that same day in hard copy the original of the industrial certification it had received by facsimile the prior Friday. The conclusion reached was that the responding party's error was reasonable in those circumstances.

14. Is it inappropriate to rely upon this error as a "legitimate reason" for the delay? The answer to that question is no. As noted in the decision dated January 8, 2008, in assessing whether the responding party has provided a legitimate reason for the delay in responding to an application, the Board will consider as one factor in exercising its discretion under section 128.1(3) of the Act whether the responding party acted (or failed to act) as a result of an innocent error. Although there is some case authority for the proposition that the Board may take a somewhat narrow view of what constitutes a "legitimate reason" for a delay (see, for example, *Reids Uptown Homes*, [2007] OLRB Rep. May/June 633 (May 16, 2007), at paragraph 35), there are also a number of other decisions that suggest that the Board will consider that concept more broadly (see, for example, *Greenleaf Homes*, [2007] CanLII 35638 (August 31, 2007), and *JD Fabricating Limited*, [2007] CanLII 48300 (October 25, 2007)). In my view, a broader consideration of that concept is appropriate.

The Length of the Delay Caused by the Late Filing by the Responding Party

15. The applicant urges reconsideration of the decision dated January 8, 2008 on the basis that the Board erred when it stated that the responding party's late filing delayed the applicant's fact-finding initiatives by two days. The applicant states that in or around the same time that the responding party's counsel served the response on Friday, October 5, 2007, the responding party shut down its operations for the long Thanksgiving weekend. The applicant states that the individuals identified as construction employees by the responding party in Schedule "A" to the response had left work and, in some instances, the city for the long weekend before the applicant had a reasonable opportunity to fully review the content of the responding party's response. The applicant asserts that these employees did not start returning to the workplace until "some time after Tuesday, October 9, 2007", and that it understands that some employees on the Schedule "A" never returned to the workplace at all.

16. In these circumstances, the applicant states that it was not able to commence its fact finding initiatives to confirm the identity of the individuals engaged in construction industry work on the application filing date (Friday, September 28, 2007) until Tuesday, October 9, 2007. It notes that this is a full 11 days after the date of application, and six days after the deadline for filing a response imposed by the Act and the Board's Rules of Procedure. The applicant notes that the Board has repeatedly stated that delay in the opportunity to conduct a timely investigation is presumptively

prejudicial, and asserts that the prejudice was magnified in this proceeding. It is asserted that the Board has not properly considered this prejudice to the applicant, and that the delay in filing the response significantly prejudiced the applicant's ability to verify the identity of the individuals working at the responding party's sites on the application filing date.

17. It is important to deconstruct some of the factual and legal assumptions made by the applicant in order to ensure that the circumstances as at October 5, 2007 are accurately stated, and their significance properly and fairly assessed.

18. First, it is accurate that the application filing date for this application for certification is September 28, 2007. The applicant chose not to deliver the application to the responding party by facsimile but rather (as it is entirely permitted to do) forwarded the package to the applicant and to the Board by way of Priority Courier on that same date. For the purposes of the Board's certification processes, the application filing date is September 28, 2007. However, it is important to keep in mind that by delivering and filing the application by way of Priority Courier, the applicant voluntarily chose a response date of October 3, 2008 (two days after the responding party receives the application for certification on Monday, October 1, 2007) rather than October 2, 2007, which would have been triggered had the application been forwarded to the responding party by facsimile on September 28, 2007. Therefore, the applicant's expectation could only have been that it would be receiving a response to the application from the responding party by 5:00 p.m. on Wednesday, October 3, 2007. The first 5 days of delay (September 28 to October 3, 2007) are effectively embedded into the particular application for certification process adopted by the applicant.

19. The response was delivered by the responding party to the applicant at approximately 2:00 p.m. on Friday, October 5, 2007 – just slightly less than two days after it was due to have been delivered in accordance with the Act and the Board's Rules of Procedure. Counsel for the applicant wrote to the Board at approximately 4:45 p.m. that same day to ask that the Board not take into account the response filed. Counsel for the applicant appears to have executed this letter. Accordingly, it appears that counsel for the applicant was in his office that day, and given the significance of the response presumably passed it (including the Schedule "A" list of employees) onto his client that same day. As a result, by 5:00 p.m. that day (if not earlier) the applicant had (or ought to have had) the response in its possession. If the response was not in the possession of the applicant by that time, the delay through to Tuesday, October 9, 2007 is not the responsibility of the responding party.

20. The application filed by the applicant in this proceeding identified four work sites as locations where employees of the responding party were performing bargaining unit work on the application filing date – the Xstrata Copper/Kidd Creek Mine, the Porcupine Joint Venture (Goldcorp) Dome Mine, the Inco North Mine and the responding party's yard in Lively, Ontario. The response filed by the responding party identifies three sites – the same sites as above, with the exception of the responding party's yard, where it asserts no construction work was performed. Accordingly, the responding party has not identified in its response one or more extra sites where bargaining unit work was performed on the application filing date – in fact, it asserts that there was one fewer site of relevance. This made the applicant's investigation easier. The responding party asserted that there were 33 individuals at work on the application filing date in that unit – and it provided the applicant with the Schedule A list as part of its response, identifying the 33 individuals. The applicant estimated that 25 people were at work in the unit. As a result, a disparity of approximately 8 individuals existed. The names of the disputed individuals would be easily

identifiable by reference to the 25 individuals the applicant was aware of at the time it filed its application.

21. It is at this point that some issue is taken with respect to certain assertions of fact made by the applicant. The applicant asserts that it was "unable to commence its fact finding initiatives to confirm the identity of the individuals engaged in construction industry work" until Tuesday, October 9, 2007. The applicant appears to state that it did nothing regarding the information provided to it by the responding party until Tuesday, October 9, 2007.

22. Although the weekend of October 6, 7 and 8, 2007 was a long weekend for Thanksgiving, if the applicant was of the view that delaying its investigation into the disparity regarding the number of individuals "in play" would be prejudicial to its interests, it ought to have commenced its investigation right away. Each and every membership card filed with the Board by the applicant identifies the signatory's name, address and home phone number. The applicant must have had an understanding of which sites its members were working at on the application filing date, and it could have contacted a number of those persons over the weekend to find out from them what they knew or understood about the individuals listed by the responding party with whom the applicant was not familiar. The responding party's worksites may have closed down for the weekend, but it was not necessary (or, perhaps, even advisable) for the applicant's organizers to go to the responding party's worksites to perform its investigation.

23. Is it unreasonable to expect the applicant to commence its fact-finding right away, over the course of a long weekend? In my view, the answer is no. Applications for certification are regularly filed with the Board that have application filing dates which fall on a Saturday (see, for example, *Fernbrook Homes Ltd.*, [2005] CanLII 41931 (November 10, 2005), *John Boddy Developments Ltd.*, [2004] CanLII 26943 (June 10, 2004)) and even on a Sunday (see *Al Gordon Electric*, [1990] OLRB Rep. June 637). As long as more than one individual is at work in the bargaining unit on the application filing date, the Board will entertain an application for certification that is filed by Priority Courier on a Saturday or a Sunday. In the construction industry, Saturday work is not unusual. Given that the applicant received the response in this proceeding from the responding party mid-afternoon on Friday, October 5, 2007, it could have commenced its fact finding right away, and continued that fact finding into and through the weekend. If the applicant chose to wait until the following Tuesday to commence its fact finding initiatives, and the delay in doing so affected its ability to secure timely information, the applicant must live with the consequences of making that choice.

24. In my view, the delay caused by the responding party's failure to respond to the application for certification until October 5, 2007 was two days, not six days or eleven days as suggested by the applicant. There is no basis for reconsideration of the decision dated January 8, 2008 on this ground.

Failure to Take Into Account Receipt of Board Confirmation of Filing (Form B-59)

25. In its Request for Reconsideration, the applicant notes that any confusion on the part of the responding party ought to have come to an immediate end upon its receipt of the Board's Construction Confirmation of Filing Form (Form B-59), which was sent by way of facsimile from the Board on October 2, 2007. The applicant notes that the responding party does not deny receiving the form, and states that the form is unique to the construction industry and clearly distinguishable from

the industrial Confirmation of Filing (Form B-1) that the responding party had previously received in relation to the industrial application.

26. The applicant states that the responding party has offered absolutely no explanation as to why it failed and/or refused to consider and/or act upon the Board's Confirmation of Filing form that it received on October 2, 2007 relating to the construction certification application. The applicant also states that the Board's January 8, 2008 decision makes no mention of the responding party's failure in that regard, and in fact "seemingly overlooks this fact entirely". The applicant submits that this is a serious error in the Board's exercise of discretion under section 128.1(3) of the Act.

27. The decision of January 8, 2008 does mention the Confirmation of Filing form expressly, in two separate places. At paragraph 6 of that decision, it is noted that although the Board did send to the responding party a Confirmation of Filing Form relating to this proceeding on the morning of October 2, 2007, "it appears that the responding party did not appreciate at that time that two separate applications were pending before the Board". The responding party, in its submissions to the Board, indicated that it did not become aware of the existence of this proceeding until late in the day on October 4, 2007 when it was notified by the Board that there were, in fact, two applications for certification. The second express reference to the Confirmation of Filing is at paragraph 10 of the decision, where it sets out the argument of the applicant made in its submissions – that had the responding party taken the time to read the Confirmation of Filing Form delivered to it on October 2, 2007, it would have realized that it was subject to two different applications for certification.

28. In my view, the applicant's reconsideration request under this ground must fail. First, I disagree with its assertion that the Confirmation of Filing Form forwarded by the Board in this proceeding (Form B-59) is "clearly distinguishable" from the Confirmation of Filing Form forwarded by the Board in the industrial certification application (Form B-1). In many ways, the argument made by the applicant here is similar to the argument it made regarding the differences in the covering letters enclosed with the two separate applications for certification in the courier package received by the responding party on October 1, 2007. I do not see the two Forms as being as "clearly distinguishable" as is suggested by the applicant. There is no doubt that the forms have slightly different Board File numbers on their top right corners, and the words "Construction Industry" follow the words "Confirmation of Filing of Application for Certification" on the heading. But otherwise the forms are very similar in shape, size and appearance. The style of cause is identical in substance, the form is addressed "to the parties listed on Appendix "A"" on each form, and the reference line is identical - "Confirmation of Filing and Delivery of Application". Thereupon follow two paragraphs, which are identical in form and substance with the exception of a few extra words on the Form B-59 which differentiate it from the Form B-1. Pages two and three of the two forms are almost word for word identical.

29. I do not doubt that if the responding party had understood that there were two separate applications for certifications pending before the Board, it would have expected to receive two sets of Confirmation of Filing forms from the Board. As noted in the January 8, 2008 decision, however, the responding party reasonably erred in its belief that it was not subject to a second, separate application for certification. It did not appreciate the fact that there was a second application for certification being sent to it with the package that it received on October 1, 2007. Accordingly, although the decision dated January 8, 2008 did not expressly deal with the responding party's failure to act upon the Form B-59 that it received, it is implicit in the conclusion that the responding party did not appreciate that it faced a second, separate application for certification that it did not appreciate as well

that the Form B-59 it received from the Board on October 2, 2007 related to a separate proceeding. It did not appreciate that there was a second application, and therefore it did not read the Form B-59 as being anything different from the Form B-1.

30. The applicant characterizes the responding party's behaviour as "refusing to act" upon the Form B-59. With all due respect, there is no basis upon which it can be reasonably asserted that the responding party intentionally refused to respond to this construction industry application for certification or refused to act upon receiving the Form B-59. The responding party responded to two other contemporaneous applications for certification filed by the applicant, and responded to this proceeding immediately after it was advised of its existence by the Board on October 4, 2007. In that light, there is no obvious reason why the responding party would purposely ignore this application or the Form B-59. The applicant has not asserted a single fact to suggest that the responding party knowingly chose to ignore the application for certification and the Confirmation of Filing Form sent by the Board.

31. There are no grounds pleaded that justifies reconsideration of the January 8, 2008 decision on this basis. The failure by the responding party to act upon the Confirmation of Filing Form was identified in that decision and was incorporated into the reasoning of the decision. The decision does not reflect a "serious error in the Board's exercise of discretion" pursuant to section 128.1(3) of the Act.

Improperly Assigning Responsibility to the Union

32. The applicant asserts in its Request for Reconsideration that the decision of January 8, 2008 improperly assigns some responsibility on the part of the applicant to account for the responding party's negligence in failing to read the information provided to it and to comply with its obligations. The applicant relies upon the following passage from the January 8, 2008 decision, which is found at paragraph 28:

> When the industrial application for certification was prepared, the applicant could have alerted the responding party to the fact that a construction application for certification was going to be filed with the Board in tandem with the industrial certification by including a similar statement in that application form. If it had done so, the responding party would almost certainly have appreciated that two separate applications were being filed with the Board on the same date, and its error would not have been as reasonable as it otherwise is.

33. The applicant states that the Board's assignment of responsibility to the applicant in these circumstances is an error in Board law and policy and establishes a dangerous precedent with respect to procedural obligations for both certification proceedings and a whole range of other proceedings before the Board. The applicant states that it complied with all aspects of the Board's processes in a timely and complete manner. It argues that there is no obligation under the Act or the Board's Rules of Procedure for it or any other applicant to "go the extra mile" and provide additional information in order to allow a responding party to appreciate and understand what has been provided to them.

34. In addition, the applicant states that the Board's observations and conclusions fail to take into account the "valid and legitimate strategic considerations" surrounding proceedings before the Board. The applicant states that if it were required to have provided the responding party with

advance notice of the construction industry application, which Rule 25.3 of the Board's Rules only requires to be delivered two business days later, that notice "would have provided the Employer with the balance of the work day on the Date of Application to become aware of an imminent construction application and take measures to potentially affect the employee constituency at work on that day". According to the applicant, "even the potential for such gerrymandering should lead the Board not to impose the additional informational obligations which the Board apparently expects from the applicant in this case".

35. The applicant appears to have misread and misunderstood the decision dated January 8, 2008. The excerpt from the January 8, 2008 decision set out above makes reference to "including a similar statement" in the construction application for certification. The statement referred to was contained in the construction industry application in this proceeding that was first physically delivered to the responding party on October 1, 2007. The statement, which was found at paragraph 11 of the application reserved for "other relevant statements", was the following:

> "In addition to the construction work performed on the Date of Application (September 28, 2007), the employees at issue also perform non-construction work on a regular basis. Without prejudice to this Construction Industry Certification Application, the Applicant shall be filing an Industrial Certification Application relating to the same employees under separate cover in due course. In doing so, the Applicant shall be relying upon the membership evidence in connection with this Construction Certification Application as evidence of the requisite employee support for its Industrial Certification Application."

Under the heading "other relevant statements" in the industrial certification application, the application delivered to the responding party by facsimile on September 28, 2007, there is no similar text identifying to the reader that a construction industry certification application would be filed with the Board.

36. Prior case authority (in particular, the decision of *Reids Uptown Homes*, cited above), identified that the Board would consider as a factor towards the exercise of its discretion under section 128.1(3) of the Act "the conduct of the union, i.e. did it contribute to the employer's delay, did it misrepresent (innocently or deliberately) an important matter to the Board". Accordingly, it was appropriate to consider whether the applicant did do something or did not do something that contributed to the responding party's delay in responding to the construction industry application for certification.

37. The mere fact that the applicant filed two separate applications for certification with the Board on the same date relating to the same responding party is not conduct that is captured by this factor – if the circumstances warrant, it is entirely appropriate for a union to file two or more applications for certification on any given date with respect to the same responding party. As noted at paragraph 30 of the January 8, 2008 decision, the applicant in such a situation is under no legal obligation to bring the existence of the second application for certification to the attention of the responding party. Accordingly, the applicant's suggestion in its Request for Reconsideration that it has an obligation to "go the extra mile" to provide additional information to a responding party is a misreading of the January 8, 2008 decision, and reflects a misunderstanding of that decision by the applicant.

38. What the January 8, 2008 decision *does* state, however, is that should the applicant in circumstances such as those found in this proceeding take steps to ensure that the responding party is made aware of the existence of two separate applications, it will be more difficult for the responding party to argue that its error was reasonable in the circumstances, should it file a late response. All other things being equal, the Board will in those circumstances be far less willing to exercise its discretion to accept late-filed information pursuant to section 128.1(3) of the Act. This is the point being made in the excerpt relied upon by the applicant in its Request for Reconsideration. The applicant has no legal obligation to do anything, but by taking certain steps it can minimize or eliminate the responding party's argument for relief should the responding party file a late response. It is ultimately up to an applicant union in any given case to determine whether it wants to take one or more of those steps.

39. There is an additional fact stated by the applicant in its Request for Reconsideration that reinforces this conclusion. In the "Background" information contained with the applicant's Request for Reconsideration, it is asserted that the hard copy of the industrial certification package (that was initially delivered by facsimile to the responding party on Friday, September 28, 2007) was delivered to the responding party on October 1, 2007 "in its own separately sealed envelope inside of a Priority Courier package". It is also stated that the construction industry certification package that was delivered to the responding party on October 1, 2007 "was in its own separately sealed envelope inside of the same Priority Courier package delivered to the Employer ...". The applicant does not suggest that these two envelopes were labeled in any way so that they were distinguished one from the other. They could easily have been labeled, one with "Construction Application" and a second with "Industrial Application", so as to have eliminated any potential confusion on the part of the responding party. They were not. In the result, on October 1, 2007 the responding party received two similar looking packages by courier, with two similar looking letters, with one of the packages being identical to the package sent by facsimile the prior Friday. The possibility that the responding party would believe that the contents of the packages were two separate copies of the same documentation in these circumstances was enhanced by the packaging.

40. The applicant asserts that should it have provided the responding party with advance notice of this construction industry proceeding by including a statement in its industrial application for certification that was delivered by facsimile on Friday, September 28, 2007, the responding party "would have provided the Employer with the balance of the work day on the Date of Application ... to become aware of an imminent construction application and take measures to potentially affect the employee constituency at work on that day".

41. With all due respect, such an assertion is almost certainly unsupportable on the facts of this proceeding. The Certificate of Delivery filed by the applicant with its industrial application for certification identifies that the responding party was sent that application and the pertinent documents by facsimile at 3:59 p.m. on Friday, September 28, 2007. As the applicant well knows, in the construction industry the relevant employee constituency is determined by reference to those employees of the responding party who perform bargaining unit work for the responding party for a majority of their working day on the application filing date. Even if it were to be assumed that the responding party was intimately familiar with the law and reviewed the application immediately upon receipt, unless the workforce would be working through the evening on that Friday, there are no "measures" that the responding party could take at 4:00 p.m. to affect the employee constituency for the purposes of the application for certification. By 4:00 p.m. on the application filing date, the construction employees working for the responding party have almost certainly gone home or are

likely just finishing their shifts at the sites in question. It has not been suggested that a new shift of construction employees was scheduled to commence work at 4:00 p.m. or later. Nor has it been suggested that a number of individuals commenced work earlier in the afternoon and were scheduled to work the majority of their shifts beyond 4:00 p.m. Although it is fair to say that had the applicant given advance notice of its application to the responding party early in the day it would risk the possibility that the responding party might gerrymander its workforce that day, on the facts of this case the applicant cannot utilize that basis for not alerting the responding party to this proceeding. It certainly cannot use this consern as grounds for not distinctively labeling the two packages delivered to the responding party on October 1, 2007.

42. The Board's Rules of Procedure provide trade unions in the construction industry with different options respecting the delivery and filing of applications for certification, which Rules reflect the transitory nature of construction industry employment. Those Rules can be (and are regularly) utilized in furtherance of a trade union's "valid and legitimate strategic considerations" that surround proceedings brought before the Board. What the January 8, 2008 decision states is that an applicant has no legal obligation other than to ensure that those Rules are complied with. However, if an applicant "goes the extra mile" in an appropriate situation, it can negate the risk that a responding party will have a strong argument for the proposition that the Board should exercise its discretion under section 128.1(3) of the Act to consider late-filed information.

43. As a result, there are no grounds under this heading that justifies reconsideration of the decision dated January 8, 2008.

Consequences of Disregarding Irregular or Negligent Conduct

44. Finally, the applicant submits in its Request for Reconsideration that the Board's refusal to hold the responding party solely accountable for its own negligence in this proceeding will send "the wrong message to the labour relations community that will resonate far beyond the confines of this Construction Application". The applicant asserts that any discretion that the Board may have pursuant to section 128.1(3) of the Act "is a limited discretion which should be exercised in narrow circumstances and in [a] manner consistent with how the Board has always approached irregular or negligent conduct by a party before the Board". It asserts that uncertainty is created in the certification process and that the Board's ability to effectively manage the timely processing of certification applications is jeopardized when the Board exercises its discretion in a case where the responding party chose not to read any of the letters sent by counsel or the Board's Confirmation of Filing Notice.

45. From a review of the submissions of the applicant one might conclude that the decision dated January 8, 2008 has caused the sky to fall upon the world of labour relations. It has not. As noted in the decision itself, and in decisions such as *Reids Uptown Homes*, cited above, in each and every case where the Board is asked to exercise its discretion to consider late-filed information in accordance with its discretion to do so, the facts of that case will govern the exercise of the Board's discretion. The January 8, 2008 decision clearly states that the Board starts its analysis from the proposition that a response in two days is the standard that is expected by the Board to be met in every case, and will consider all of the circumstances before it in order to determine whether it is appropriate to exercise its discretion to relieve against the late filing of a response. If a responding party takes far too long to file its response (or to propose changes to its response), or appears to have delayed its response in order to make it more difficult for the applicant to establish its claim to a

certificate, the Board will likely refuse to exercise its discretion. As noted in the decision, it is of primary importance to the Board that the responding party have a persuasive reason for the delay. In the absence of such a persuasive reason, the responding party will have a real challenge in successfully convincing the Board to exercise its discretion.

46. There is no dispute that the discretion given to the Board under section 128.1(3) of the Act to accept late filed information should be exercised carefully and prudently. But exercising the discretion under section 128.1(3) is more than just determining that the responding party did not do something it ought to have done and then "allowing the chips to fall where they may". There are a number of factors that must be considered and weighed, and although the conduct of the responding party is one of those factors, it is not the only one. That said, there is nothing in the January 8, 2008 decision to suggest that it is now "open season" on the two day time line dictated by section 128.1(3) of the Act. As the case law develops, it will become clearer to the labour relations community how the Board will exercise its discretion. But, as noted above, the Board expects that a responding party will meet the two day time period required by the Act to respond to an application for certification. Should a responding party request that the Board consider its late-filed information, the burden will be on that responding party to persuade the Board that it should, having regard to the factors identified in the Board's cases to date. Given the potential consequences, a responding party takes a considerable risk should it choose to file an untimely response and then seek the Board's exercise of discretion in order to have the late-filed information considered.

Conclusion

47. For the reasons set out above, the grounds contained in the applicant's Request for Reconsideration do not reflect any basis for a reconsideration of the January 8, 2008 decision. The Request for Reconsideration is therefore dismissed.

48. This proceeding is referred to the Registrar for the setting of hearing dates.

1541-07-R; 1542-07-R; 1543-07-R; 1544-07-R; 1549-07-R; 1550-07-R; 1690-07-U International Union of Operating Engineers, Local 793, Applicant v. **Clean Water Works Inc.**, Responding Party; Labourers' International Union of North America, Ontario Provincial District Council and International Union of Operating Engineers, Local 793, Applicants v. **Clean Water Works Inc.**, Responding Party

Bargaining Unit – Certification – Construction Industry – Practice and Procedure – Status – Unfair Labour Practice – The Board issued a number of preliminary and procedural rulings in these various files: (1) the Board confirmed that it can find an appropriate bargaining unit includes both the ICI sector throughout the province plus an appropriate geographic area outside the ICI sector even though no employees were at work in the ICI sector on the date of application; (2) there was nothing to prevent the Board from determining the bargaining units in each of the construction industry applications and the industrial applications; (3) the Board refused to entertain the late-filed lists of employees provided by the responding party at the regional certification meeting because of the prejudice the applicants

would suffer if such lists were accepted after such a delay from the date of application – Some certificates issued; other matters continue

BEFORE: *Lee Shouldice*, Vice-Chair.

DECISION OF THE BOARD; March 3, 2008

Introduction

1. In accordance with the agreement of the parties, the name of the responding party in each of the above proceedings is amended to read "Clean Water Works Inc." ("Clean Water Works" Inc.).

2. These proceedings consist of six separate applications for certification relating to Clean Water Works, and an unfair labour practice complaint relating to events surrounding the certification applications. A thumbnail description of each of the certification applications is set out in the six paragraphs immediately below.

3. Board File No. 1541-07-R is a construction industry certification application filed on August 2, 2007 by International Union of Operating Engineers, Local 793 ("the IUOE") with respect to Clean Water Works pursuant to section 8 of the *Labour Relations Act, 1995*, S.O. 1995 c.1, as amended (the "Act"). This application relates to the ICI sector of the construction industry and to all other sectors of the construction industry in Board Areas 13, 14 and 15.

4. Board File No. 1542-07-R is a construction industry certification application filed on August 2, 2007 by the IUOE with respect to Clean Water Works pursuant to section 128.1 of the Act. This application does not relate to the ICI sector of the construction industry, but relates to all sectors of the construction industry other than the ICI sector in Board Area 26.

5. Board File No. 1543-07-R is a construction industry certification application filed on August 2, 2007 by Labourers' International Union of North America, Ontario Provincial District Council ("LIUNA") with respect to Clean Water Works pursuant to section 128.1 of the Act. This application does not relate to the ICI sector of the construction industry, but relates to all sectors of the construction industry other than the ICI sector in Board Area 26.

6. Board File No. 1544-07-R is a construction industry certification application filed on August 2, 2007 by LIUNA with respect to Clean Water Works pursuant to section 8 of the Act. This application relates to the ICI sector of the construction industry and to all other sectors of the construction industry in Board Areas 13, 14 and 15.

7. Board File No. 1549-07-R is an industrial certification application filed on August 7, 2007 by LIUNA with respect to Clean Water Works pursuant to section 8 of the Act relating to employees of Clean Water Works employed in Ottawa.

8. Board File No. 1550-07-R is an industrial certification application filed on August 7, 2007 by LIUNA with respect to Clean Water Works pursuant to section 8 of the Act relating to employees of Clean Water Works employed in Burlington.

9. A representation vote was taken in Board File No. 1550-07-R, but no vote was ordered in Board File Nos. 1541-07-R, 1544-07-R or 1549-07-R. The parties have participated in Regional Certification Meetings regarding the above-referenced proceedings and have identified the issues that remain in dispute in each of these proceedings. Amongst those issues (in some or all of the files) are (i) the appropriate units for bargaining; (ii) employee status; (iii) section 11 relief; and (iv) whether the Board should permit the responding party to add names to the lists of employees. I have reviewed the submissions of the parties and it does not appear to me that all of the issues can be resolved by the Board without an oral hearing. However, some of the issues can be resolved without a hearing on the basis of the full written submissions of the parties, as described in greater detail below.

Bargaining Unit Issues

Construction Applications

ICI Applications

10. One issue that is common to Board File Nos. 1541-07-R, 1542-07-R, 1543-07-R and 1544-07-R is the proper description of the bargaining unit. Stated in very general terms, the IUOE and LIUNA have each applied for what it asserts is its "standard" bargaining unit in each of the four applications. The responding party does not agree with the bargaining unit requested by each applicant. In the applications relating to the ICI sector of the construction industry, Clean Water Works asserts that it does not perform work in the ICI sector and did not do so on the application filing date. It states that it performs work exclusively in the sewer and watermain sector of the construction industry, and asks that the Board limit the bargaining units accordingly. In its written submissions on this issue, the responding party indicates that it does not dispute that the bargaining unit descriptions proposed by the applicants "may generally be an appropriate one". However, because of the multiplicity and overlap of the certification applications, it asserts that it is "unable to agree with the description proposed at this time". In response to these submissions, the applicants state that given long standing jurisprudence at the Board they do not understand the position taken by the responding party.

11. The Board does not understand the position taken by the responding party either. No persuasive argument is made by the responding party to justify the position it takes regarding the description of the bargaining units. The bargaining units requested by the applicants are not just "generally" appropriate - they are, in fact, entirely appropriate in the circumstances.

12. The IUOE and LIUNA are each an affiliated bargaining agent of an employee bargaining agency designated by the Minister of Labour to represent operating engineers and construction labourers, respectively, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. Accordingly, each is entitled to bring an application for certification under section 158(1) of the Act in which bargaining rights for the ICI sector of the construction industry are secured on a province-wide basis. Section 158(1) of the Act provides that the unit of employees in such an application "shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area" unless bargaining rights for that geographic area have already been acquired pursuant to section 158(2) of the Act or by voluntary recognition. Affiliated bargaining agents of an employee bargaining agency are not required to apply for an ICI bargaining unit – see section 158(2) of the Act. However, only an employee bargaining agency or an affiliated bargaining agent of an employee

bargaining agency can apply for province-wide ICI bargaining rights in Ontario. That is what each of the applicants has done in two of these proceedings (Board File Nos. 1541-07-R and 1544-07-R). Should an application be successful, section 160(1) of the Act provides that two certificates are to be issued by the Board – one relating to the ICI sector on a province-wide basis and a second relating to *all* other sectors of the construction industry in an appropriate geographic area or areas.

13. Clean Water Works asserts that it had no employees in the ICI sector of the construction industry on the application filing date. Even if this assertion is factually accurate, it does not preclude the Board from issuing a certificate that relates to the ICI sector, as mandated by section 160(1) of the Act. In the recent decision of *Labelle Brothers Construction* (Board File 1266-07-R, decision dated July 18, 2007), the Board made the following observations regarding the very same argument made by the responding party in that proceeding:

> 11. Furthermore, the responding party suggests because its employees were not employed in the industrial, commercial and institutional sector, then the application for certification cannot have that sector included in an appropriate bargaining unit. If an application for certification relates to the industrial commercial and institutional sector of the construction industry, the description of the appropriate bargaining unit is mandated by section 158(1) of the Act and therefore must include that sector as an element of the description of the appropriate bargaining unit. Whether an application for certification "relates" to the industrial, commercial and institutional sector of the construction industry depends on the applicant indicating that it seeks a bargaining unit that includes that sector. In other words, the applicant trade union decides when it makes its application for certification whether its application will relate to that sector. See *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1729 at 1733; *Pelar Construction Ltd.*, [1981] OLRB Rep. Feb. 210 at 214; *Adams Report to the Minster of Labour*, May 1, 1980; *Aero Block and Precast Ltd.*, [1984] OLRB Rep. Sept. 1166. The Board in *Aero Block and Precast Ltd.*, wrote at page 1175:
>
> > In the Board's decision in *Colonist Homes, supra,* it interpreted section 144 [now 158] of the Act to mean that the applicant in an application under that section, and not the Board, decides whether the application relates to the ICI sector and is made under section 144(1) of the Act or does not relate to the ICI sector and is made under section 144(3).
>
> 12. The applicant clearly indicated this application relates to the industrial, commercial and institutional sector of the construction industry because the bargaining unit it proposed encompassed that sector of the construction industry. The Board can find an appropriate bargaining unit includes both the ICI sector throughout the province and an appropriate geographic area outside the ICI sector even though no employees were at work in the ICI sector on the date of application. See, for example, *Colonist Homes Ltd., supra*; *Pelar Construction Ltd., supra* and *Walloy Excavating Company Ltd.*, [1986] OLRB Rep. April 576. The Board is satisfied the bargaining unit proposed by the applicant is an appropriate bargaining unit consistent with section 158(1) of the Act whereas the bargaining unit proposed by the responding party is not in the circumstances of this application.

14. There is no fact pleaded nor any argument made by the responding party to suggest that the conclusion reached by the Board in *Labelle Brothers Construction* ought not to be reached here.

Non-ICI Applications

15. As noted above, an affiliated bargaining agent of an employee bargaining agency such as both applicants in these proceedings need not apply for a bargaining unit that relates to the ICI sector of the construction industry. Here, two of the applications relating to the construction industry are non-ICI applications – Board File Nos. 1542-07-R and 1543-07-R.

16. In Board File No. 1542-07-R, the IUOE seeks a unit of employees described as follows:

> all employees of Clean Water Works engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, in all sectors of the construction industry excluding the ICI sector in the construction industry in Board Area 26, save and except forepersons and persons above the rank of non-working foreperson.

Similarly, in Board File No. 1543-07-R, LIUNA seeks a unit of employees described as follows:

> all construction labourers in the employ of Clean Water Works in all sectors of the construction industry, excluding the ICI sector of the construction industry, in Board Area 26, save and except forepersons and persons above the rank of non-working foreperson.

Clean Water Works desires to limit the above-referenced units to the sewer and watermain sector of the construction industry in Board Area 26.

17. The units sought by the IUOE and LIUNA are appropriate for bargaining in the construction industry. Section 158(2) of the Act provides that a trade union represented by an employee bargaining agency (both the IUOE and LIUNA are such trade unions) may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the ICI sector of the construction industry. In that circumstance, section 158(2) of the Act provides that such a unit "shall be deemed to be a unit of employees appropriate for collective bargaining". Section 158(2) of the Act is determinative of this issue. The units proposed by the IUOE and LIUNA are appropriate for collective bargaining.

18. As a result, the Board can and will determine the bargaining units in each of the construction industry applications (Board File Nos. 1541-07-R, 1542-07-R, 1543-07-R and 1544-07-R) without the need for further submissions by the parties.

Industrial Applications

19. There is also a common issue to Board File Nos. 1549-07-R and 1550-07-R relating to the appropriateness of the bargaining units claimed by the applicant LIUNA. In Board File No. 1549-07-R, LIUNA requests a bargaining unit worded as follows:

> all employees of the responding party in the City of Ottawa, Ontario save and except office, clerical and sales staff, foremen and persons above the rank of foremen.

Similarly, in Board File No. 1550-07-R LIUNA requests a bargaining unit worded as follows:

> all employees of the responding part in the City of Burlington, Ontario, save and except office, clerical and sales staff, foremen and persons above the rank of foremen.

The responding party in both applications proposes a province-wide scope for the bargaining units, with the same exceptions.

20. The submissions filed with the Board by LIUNA note that it is trite law that one question before the Board in every application for certification is whether the bargaining unit requested by the applicant is a unit of employees that is appropriate for collective bargaining. That is, the Board is mandated to determine whether the unit requested by the applicant is an appropriate unit – and not whether there may be another unit that is more appropriate in any given case. It asserts that the bargaining unit sought by Clean Water Works is so broad that one can assume that it was structured to prevent LIUNA from organizing its employees, which is contrary to one of the purposes of the Act, and which should itself lead the Board to conclude that it is inappropriate for collective bargaining. It asserts that a municipal-wide unit is appropriate having regard to the Board's general practice.

21. The submissions filed with the Board by the responding party regarding the two industrial applications do not contain a particularly persuasive rationale for the position it takes regarding these two units. In its response to each of the applications, it states that the responding party operates from a centralized location in Ottawa, and performs project-based work throughout the Province of Ontario. It states that it has no offices or facilities in Board Area 26 (which encompasses Burlington), and is operating in that area on a short term job specific project. It asserts that it assigns employees to projects based upon availability, expertise and job requirement. It claims that the communities of interest between those employees working in Board Area 26 and all of its employees working elsewhere are identical. Finally, it asserts that fragmentation of bargaining units would not facilitate sound labour relations. There are no further facts pleaded or arguments made on this issue in its submissions dated September 17 and September 20, 2007.

22. Assuming that all of the facts asserted by Clean Water Works in its response to these two industrial applications for certification are true and provable, in my view Clean Water Works has not established that the bargaining units requested by LIUNA in Board File Nos. 1549-07-R and 1550-07-R are not appropriate for collective bargaining. As noted above, the Board is not mandated to determine which of two proposed bargaining units is a "better" unit for collective bargaining. The Board's mandate is to determine whether the unit of employees proposed for bargaining by an applicant is appropriate for collective bargaining. If it is, the applicant will be allowed to apply to represent that unit of employees. Only if the responding party can establish that the unit requested by the applicant will cause serious labour relations problems for the employer will the Board refuse the unit of employees requested by the applicant – see *The Hospital for Sick Children*, [1985] OLRB Rep. February 266, *Active Mold Plastic Products Ltd.*, [1994] OLRB Rep. June 617 and *Metroland Printing, Publishing and Distributing Ltd.*, [2003] OLRB Rep. January/February 104 (February 19, 2003).

23. In my view, Clean Water Works has not pleaded facts which, if assumed to be true and provable, would establish that serious labour relations problems would result for it should the bargaining units in question be granted. There is nothing inherent in the fact that the employees working for Clean Water Works in Burlington would initially originate from Ottawa to suggest that a municipal-wide unit referable to Burlington is not appropriate for collective bargaining. Similarly, it is not necessary for an employer to have a "head office" within the geographical scope of the bargaining unit for that unit to be appropriate for collective bargaining.

24. Clean Water Works has raised fragmentation and differing communities of interest as grounds for arguing that the units proposed by LIUNA are inappropriate for collective bargaining. Although fragmentation of bargaining units is a factor that may be considered by the Board to be of significance in any given case, the establishment of two, municipal-wide bargaining units for one employer operating in Ontario is hardly the type of fragmentation that the Board typically concerns itself about. Although the Board has frequently stated that broader-based bargaining units are more stable and therefore better for collective bargaining, that does not necessarily require one to conclude that in the absence of a province-wide bargaining unit there are legitimate concerns regarding fragmentation (see, for example, the discussion of fragmentation in *Metroland Printing*, cited above, at paragraph 25 and following). No such concerns are identified by Clean Water Works in these proceedings.

25. Turning to the question of differing communities of interest, in my view the position taken by Clean Water Works in these two applications regarding the concept of community of interest in large measure misses the mark. In essence, the position taken here by Clean Water Works is that because the terms of employment and working conditions of its employees are identical, only one unit consisting of all of its employees is appropriate for collective bargaining. But even if the terms of employment and working conditions of its employees in both Ottawa and Burlington are, in fact, identical, it is not necessarily the case that two separate, municipal-wide bargaining units will create serious labour relations problems for Clean Water Works. If LIUNA desired to have one, province-wide unit of employees, Clean Water Works is effectively asserting that that desire would be appropriate because the terms of employment of all of its employees are consistent. However, if LIUNA desires two, municipal-wide units, the fact that the terms of employment of all of the employees of Clean Water Works are identical does not mean that two municipal-wide units are inappropriate for bargaining. Clean Water Works must provide something more than it has before the conclusion could be reached that the units requested by LIUNA are inappropriate for bargaining.

26. Bargaining units in the nature of those proposed by LIUNA in the two industrial certification applications are regularly determined by the Board to be appropriate for collective bargaining. The responding party has not established, factually, that the units requested by LIUNA will cause serious labour relations problems for it should they be granted. As a result, the Board can and will determine the bargaining units appropriate for bargaining in both of the industrial certification applications (Board File Nos. 1549-07-R and 1550-07-R) without the need for further submissions by the parties.

List Issues

27. There is a list issue common to four of these proceedings – namely Board File Nos. 1541-07-R, 1542-07-R, 1543-07-R and 1544-07-R. In these four proceedings, the responding party did not file a list of employees with each response when each response was filed with the Board. At the

Regional Certification Meetings, which were held slightly more than one month after the application filing date, the responding party attempted to establish its list of employees for each proceeding by adding names to the list of employees that was offered by the applicants for each proceeding. Each applicant objected to the responding party adding names to its list for each of these files at that stage of the proceeding.

28. The parties filed full written submissions regarding the result that they desired the Board to reach in the circumstances. The applicants assert that it is totally inappropriate for the responding party to be able to file or add to lists of employees in the circumstances described above. The applicants assert that they have been prejudiced by the responding party's failure to file a list in that they have not been able to investigate who was working at which location and the nature of the work that they were performing on the date of application. Accordingly, they ask that the Board not exercise its discretion to allow the responding party to add employees to the lists or to submit an entire employee list.

29. Relying upon the wording of section 7(14) and section 128.1(3) of the Act, the applicants observe that the responding party was required to file its list with its response within 2 days of the date that the applications were delivered to it. It notes that this regime has existed for a considerable period of time, and that the Board has consistently refused to exercise its discretion to permit a responding party employer to add names to the employee list after the time period mandated by the Act and the Board's Rules except in very unusual circumstances. The applicants rely upon *Gagnon Demolition Inc.*, [2007] OLRB Rep. March/April 358 (April 11, 2007), *Kralik Electrical Services Inc.*, [2007] OLRD No. 1525 (April 13, 2007), *Reids Uptown Homes*, [2007] OLRB Rep May/June 633 (May 16, 2007), *Aramark Canada Limited*, [2007] CanLII 24626 (June 25, 2007) and *Struct-Con Construction Ltd.* [2007] OLRB Rep. July/August 810 (July 23, 2007) in support of their position. The applicants submit that the reasoning in these cases, particularly *Reids Uptown Homes*, should be applied to the circumstances here and result in the Board refusing to consider the lists of employees put forth by the responding party.

30. The responding party fully addressed the position taken by the applicants on this issue in its submissions dated September 20, 2007. Not surprisingly, the responding party relies upon the fact that six separate applications for certification were filed by the applicants referable to the responding party on the same date. It is asserted that responding to six separate applications for certification was difficult to co-ordinate, having regard to the complexity of issues raised. In fact, the responding party asserts that this series of applications "may constitute one of the more complex certification applications the Board has had to deal with". It describes sorting through these multiple applications as being a daunting task and notes that the Board identified in a previous decision that there were myriad issues raised in these proceedings. As a result of the complexity of the proceedings, the responding party found that it was "unable to provide a useful indication of the names of the employees" for each of the applications with the exception of Board File No. 1550-07-R. Instead, it provided the applicants with its "best estimate" of employees in the described bargaining units in its response, and a comprehensive list of employees in respect of the response filed in Board File No. 1550-07-R. It asserts that the applicants were "fully advised of all potential employees in each Board area and throughout the province" through the list of employees filed in Board File No. 1550-07-R.

31. The responding party relies upon the following factors to explain why it was unable to provide a list of names in each of the four proceedings referred to above:

(a) on the application filing date, the responding party operated in four separate Board areas. It is asserted that the two applicants sought "overlapping certifications" in the ICI sector, all other sectors of the construction industry and what is referred to as the "industrial sector". This made the ability to identify lists of employees manifestly complex;

(b) it is asserted that the applicants in fact served the responding party with twelve applications, even though they had filed only six with the Board. The duplicate applications required additional time and effort to sort through in the limited time available;

(c) in the IUOE applications, the bargaining unit description proposed by the IUOE provided the responding party with some difficulty, because the responding party does not use "cranes, shovels, [or] bulldozers" – it was only the "and similar equipment" portion of the unit description that could be "the subject of scrutiny". It states that the IUOE "provided no information in that regard" and "based upon their present responses, would not include the operation of a back-hoe as falling within the description". It states that none of the other equipment utilized by the responding party clearly or intuitively fits into the "similar equipment" criteria. It further states that the responding party found that it would be required to "guess" at the type of equipment claimed within the proposed bargaining unit description because the "applicants proposed no specificity in respect of their applications [sic] scope of inclusion". It asserts that as a result it suffered prejudice in the circumstances (as opposed to the applicant), and that this was by the applicants' design;

(d) the IUOE, in Board File 1541-07-R, asserted that there were two individuals performing bargaining unit work in the ICI sector in all of Ontario and in Board Area 26. In Board File 1542-07-R, the IUOE asserted that there were two individuals performing bargaining unit work in all other sectors of the construction industry other than the ICI sector in Board Areas 13, 14 and 15. Because the responding party was performing work of the same nature in Board Areas 13, 14, 15 and 26 on the application filing date, it could not appreciate the distinction being drawn by the IUOE; and

(e) with respect to the LIUNA applications, the responding party states that "similar sectoral issues arise", notwithstanding that the responding party was performing similar work in the four Board Areas on the application filing date. It states that "LIUNA alleges ICI work, non-ICI construction work and industrial work by the same individuals in respect of the same work, on the same day in the four Board areas". In addition, LIUNA claimed "the same employees referred to in the IOUE [sic] applications".

The responding party further states that the applicants at no time indicated that the responding party's materials were insufficient or incomplete, or that it was unaware of the responding party's position with respect to these applications. It submits that the information provided in the responses was appropriate in the context of the applications filed by the applicants in these proceedings.

32. In the event that the Board determines that the responding party ought to have filed a list of employees with each of the responses filed with the Board, the responding party argues that the Board should exercise its discretion to permit it to file the amended list as requested.

33. With respect to the card-based applications for certification, the responding party asserts that the applicants can claim no prejudice from the absence of a list of employees because they claim to have cards from 2 individuals making up more than 55% of the employees alleged to be performing work in the bargaining unit (i.e. both of the individuals signed). It asserts that even if it were to be assumed that the ability of a union to ascertain what tasks an individual employee performed on the date of application does diminish rapidly after the application filing date, the Board must satisfy itself that manifest prejudice does exist. This is not, it is asserted, the case here. The responding party notes that the applicants did not raise the absence of the lists until the Regional Certification Meetings, and make no allegation or provide any material facts to support the assertion that they have in fact suffered any prejudice. The responding party states that the applicants allege no efforts made to acquire any information, nor any difficulty in acquiring such information. It asserts that the applicants must demonstrate that ascertaining the true state of events was unachievable. Here, it claims that "intuitive logic" dictates that the information the applicants assert was unavailable was obvious "with any degree of inquiry".

34. With respect to the vote-based applications for certification, the responding party states that Board jurisprudence has focused on prejudice, and expresses concern that delay prejudices an applicant when a vote is ordered. Here, no vote was ordered by the Board with respect to Board File Nos. 1541-07-R, 1544-07-R and 1549-07-R. The responding party also notes that the applicants filed these applications for certification with the Board on August 2, 2007, but elected not to serve them on the responding party until August 7, 2007. This suggests that time was not of the essence for the applicants, and, it is argued, militates against the argument that opportunities were lost to verify employment status by the passage of time. The five day gap reflects that the applicants themselves exercised no diligence in preserving their own ability to verify employment status.

35. Finally, the responding party asserts that the applicants are, in these applications, responsible for the difficulties that the responding party had in identifying individuals that might fall within the proposed bargaining unit descriptions. The responding party goes further to state that if the Board were to refuse to exercise its discretion to consider the late-filed information by the responding party, it "may be both countenancing and facilitating a certification by fraud". It notes that the applicants claim that three identified employees should vote (or have their cards accepted) in respect of two geographically distant Board Areas – Board Areas 26 and Board Areas 13, 14 and 15. The three people, it is argued, could not have been performing work in different Board Areas on the application filing date, and the applicants should be aware of that. It is submitted that the applicants should not be "permitted to profit from this apparent misrepresentation".

36. For the reasons set out below, I am of the view that the factual assertions pleaded by the responding party in support of its delay in providing a list of employees are not sufficient to warrant the exercise of the Board's discretion under either section 7(14) or section 128.1(3) of the Act.

37. With respect to the vote-based applications for certification (Board File Nos. 1541-07-R, 1544-07-R and 1549-07-R), the Board has identified a number of factors that it will consider in determining whether to exercise its discretion to extend the time to file a response to an application for certification. The factors taken into account by the Board include such factors as the reasons for

the delay, the length of the delay, and the prejudice to the applicant in allowing or refusing the extension of time (see, for example, *Iori Plaster & Drywall Contractors Ltd.*, [1997] OLRD No. 4411, *Summit View Homes Ltd.*, [2001] OLRB Rep. September/October 1282 (September 20, 2001), and *High Performance Drywall*, [2003] CanLII 43727 (February 21, 2003)). When analyzing the prejudice to the applicant, the Board considers whether the filing of a late response would preclude the union from being able to properly investigate the issues raised in the response (in particular, the list of employees) and whether the union would have the ability to withdraw the application and re-file same without the imposition of a bar under the Act.

38. With respect to the card-based applications for certification (Board File Nos. 1542-07-R and 1543-07-R), in *Maystar General Contractors Inc. v. The International Union of Painters and Allied Trades, Local Union 1819* [2007] CanLII 8928 (March 20, 2007) ("*Maystar*"), the Divisional Court determined that the Board has the discretion to consider information filed with the Board after the time required by section 128.1(3) of the Act. Subsequent to that decision, the Board has had occasion to issue decisions speaking to some of the factors it will take into account in exercising its discretion to consider late-filed information (see, for example, *Gagnon Demolition Inc.*, [2007] OLRB Rep. March/April 358 (April 11, 2007), *Kralik Electrical Services*, cited above, *Lemmo Masonry Inc.*, cited above, *Reids Uptown Homes*, cited above, *Mega Painting & Décor* [2007] CanLII 29087 (July 20, 2007), *Struct-Con Construction Ltd.*, [2007] OLRB Rep. July/August 810 (July 23, 2007), *Greenleaf Homes*, [2007] CanLII 35638 (August 31, 2007), and *Thornhill Electric Inc.*, [2007] CanLII 38908 (August 29, 2007).

39. In *Reids Uptown Homes*, the responding party employer filed a response with the Board five days after the date prescribed by the Act, without a particularly cogent explanation for the delay in responding other than that a representative of the responding party was not in the office to review the materials that were delivered to it by the union by way of facsimile. The Board reviewed the circumstances under which it would consider the late-filed information of an employer, and identified some of the factors it would consider in deciding whether to exercise its discretion to do so.

40. After noting that each case must be decided on its own merits, the Board identified a number of considerations that might be relevant in any given case:

> (a) the reasons for the failure to file a response in a timely fashion;
>
> (b) whether the union had actual notice of the employer's position;
>
> (c) the conduct of the union, i.e. did it contribute to the employer's delay, did it misrepresent (innocently or deliberately) an important matter to the Board;
>
> (d) whether there is any history of dealing between the employer and the applicant union that is relevant to the issue of the employer's lateness in filing the application;
>
> (e) whether the employer acted quickly on learning of the true situation.

41. The Board discussed other factors that might be considered when exercising its discretion under subsection 128.1(3) of the Act. One of those factors is prejudice. At paragraphs 29 to 32 of the decision, the Board discusses the concept of prejudice and its significance to the exercise of the

Board's discretion when responses are delivered beyond the time set out by the Act. The Board makes the following observations at paragraphs 31 and 32 of its decision, the passage of the decision relied upon by the applicant in this proceeding:

> 31. Even where a union has information about a particular job site, the significance of specific individuals and the specific work they were doing is not necessarily apparent until an issue is raised by an employer. The possibility of lost or ignored evidence arises even over a short period of time. In addition, and particularly in circumstances where a union is faced with a suggestion that there were more employees than they were aware of or believed to be at work, or the existence of an alleged job site of which they were unaware, the ability to ascertain accurate information about the factual basis for the employer's position diminishes by the hour. A delay of even one or two days increases this difficulty. The ease with which a person working on a construction site will be able to determine who he or she was working with and what tasks were accomplished on an otherwise unremarkable working day falls off with surprising rapidity.
>
> 32. The prejudice then is real, even in the context of the very short time limits that prevail in certification applications. What is perhaps even more significant is that this prejudice will be the same in every case. Any decision to consider late-filed information (except in cases such as *Maystar General Contracting Inc., supra*, where the union in fact had the information) will always involve prejudice, and the same kind of prejudice, to the union. That suggests an even greater focus on the reasons for the employer's failure to provide the information to the Board in a timely fashion.

42. The Board concluded its analysis by stating that how these or any other factors will be applied will be determined by the facts of cases as they actually arise.

43. It is important to appreciate the context within which the Board is asked to exercise its discretion to consider late-filed information. As noted by the Board in *Reids Uptown Homes* (at paragraphs 21 through 27), the two-day time frame within which a responding party to an application for certification must file information with the Board regarding the bargaining unit description and the identity and number of persons in the bargaining unit reflects the Board's experience "that it is at the time of certification that one finds the greatest risk of loss of the ability to exercise rights under the Act" (at paragraph 23). The two-day time frame confirms that the Legislature expects a responding party employer to provide the information required by section 128.1(3) of the Act quickly. There is no doubt that preparing and properly delivering a response in two days can be a challenge to an employer. However, having regard to the potential for the passage of time to defeat the true wishes of employees – particularly in the construction industry - the Legislature determined that an employer that is subject to an application for certification in the construction industry should have its response containing the information set out in section 128.1(3) of the Act delivered to the applicant and filed with the Board within two days of receiving it from the applicant. The Board therefore starts from the proposition that two days is the standard that is expected to be met by a responding party in every case.

44. The Divisional Court has indicated that the Board has the discretion to consider information that is filed late with the Board, notwithstanding the wording of section 128.1(3) of the Act. Accordingly, the Board must determine in every case when the responding party files a late

response with the Board whether it will consider the information about the bargaining unit description and the identity and number of persons in the bargaining unit that is contained within that response. On what basis will the Board determine whether to exercise its discretion in any given case?

45. In my view, the primary obligation of the Board in any given case is to carefully weigh all of the circumstances before it in order to determine whether it is appropriate to exercise its discretion to relieve against the late filing of a response, and to consider the information contained therein relating to subsection 128.1(3) of the Act.

46. The Board's jurisprudence to date reflects that no one factor is determinative, and there is an evolving set of factors. Although all of the circumstances surrounding the failure by the responding party to file a timely response will be considered by the Board, of primary importance to the Board will be the reasons offered by the responding party for the delay in delivering the response. As noted above, a responding party to an application for certification is expected to file its response within the two-day time limit reflected by section 128.1(3) of the Act. As a result, an employer that requests the Board to exercise its discretion to consider the information contained in a late-filed response will in the normal course be expected to persuade the Board at the same time that it files its response that there is a legitimate reason for the delay in responding. An employer that requests that the Board exercise its discretion in these circumstances should provide the Board and the applicant with the reason or reasons for the delay in delivering the response, a full and detailed statement of the material facts upon which it relies to support its request, and include any documentation that supports its position.

47. In assessing whether the responding party has provided a legitimate reason for the delay in responding to the application, the Board will consider whether the responding party attempted to deliver and file a timely response (but for some reason beyond its control could not do so), whether the late filing was due to an innocent error, and whether but for the circumstances facing the responding party it can objectively be concluded that the responding party likely would have filed a timely response in the normal course.

48. Although it is of primary significance to the Board, the reason for the delay is not the only factor that will be taken into account by the Board, nor will it be singularly determinative of the request made by the responding party. Other factors are also of considerable significance, such as whether the union contributed to the employer's delay or whether the responding party responded immediately after becoming aware of the situation. In addition, the Board will consider how long beyond the two-day statutory time frame the responding party actually delivered and filed its response. In that regard, the extent to which the applicant is prejudiced by the failure of the responding party to file a timely response is a critical factor that must be weighed by the Board in every case. In *Reids Uptown Homes*, the Board noted that it can be very difficult for a union to ascertain with any degree of certainty the accuracy of the factual basis for the position being taken by an employer as time progresses beyond the initial two-day time period for filing a response to an application for certification.

49. The prejudice to a union as a result of a late-filed response will depend upon the circumstances of each case. In certain cases, there may be little prejudice, if any, to a union resulting from a short delay in delivering and filing the response – see, for example, both *Maystar* and *Gagnon Demolition Inc.*, cited above, where the union had actual notice of the employer's position. That said, the Board's experience allows it to take judicial notice of the fact that the ability of a union in the

construction industry to ascertain accurate information about the factual basis for a responding party's position – particularly when the union is alleged to have underestimated the number of employees in the bargaining unit - diminishes rapidly as time progresses, and that delays of even one or two days may well lessen this ability in a meaningful way.

50. Turning to the facts of these proceedings, it is important to keep in mind the total number of employees of Clean Water Works affected by these applications. Having reviewed the lists of employees relied upon by the responding party, it would appear that the responding party's complement of employees totals 35. Accordingly, this is not a situation where the number of individuals whose status must be reviewed and considered falls into the hundreds. There are 35 employees affected by these six applications.

51. The fact that the applicants filed six separate applications for certification with the Board on the same date admittedly adds complexity to the situation. The Board appreciates that properly responding to one application for certification can be time consuming, and that responding to six separate applications at one time will be that much more difficult to co-ordinate. That said, to describe that task as "daunting", particularly when the number of individuals affected by the applications totals only 35, considerably overstates the extent of the complexity. Assuming that the applicants did, in fact, serve twelve applications for certification on the responding party, that too would make things more complicated - though only for a short period of time, when a review of the applications would have made it clear that there were duplicates. The identity and contact information for the applicants' legal counsel is contained on the face of the applications. Should there have been any confusion created by the applicant regarding the number of separate applications for certification, a phone call to the lawyer representing the applicants would have solved that issue relatively quickly. Accordingly, although the overall circumstances facing the responding party on August 7, 2007 when it received the six applications for certification were undoubtedly complicated, in the Board's view the circumstances were not so complicated as to be unworkable over the two day response period.

52. Clean Water Works' argument that confusion resulted from the nature of the applications brought by the applicants (as distinct from the number of the applications) is not persuasive. None of the four construction applications for certification are "overlapping" – there are two applications relating to operating engineers, and two applications relating to construction labourers, and the bargaining units requested in all four applications are separate and distinct. The industrial certification applications are also separate and distinct. There is no doubt that there may be questions raised by Clean Water Works regarding the identity of the bargaining unit that any given employee was actually working in on the application filing date. It is highly likely in these circumstances that at least some of the names of employees said to be properly on the list in one construction application will also be found on a list of employees compiled for the purposes of responding to another construction application, and that many (and perhaps all) of the employees will be found on the list of employees compiled in the industrial certification applications. However, this is not an unusual situation – the distinction between what constitutes a construction industry application for certification and what constitutes an industrial certification application can be very thin, as can the distinction between a construction labourer, on the one hand, and an operating engineer on the other.

53. The task that is required of a responding party employer in these situations is to assess as best it can into which particular unit any given individual may fall. In this regard, the fact that the IUOE applications make reference to "cranes, shovels and bulldozers" and "similar equipment", and

that this appears to have confused the responding party, is of no significance to the Board. For the reasons discussed above, the IUOE applied for a bargaining unit of employees that complies with the statutory designation (for the ICI application) and that is statutorily deemed to be appropriate for bargaining (for the non-ICI application). There is certainly no obligation on the part of the applicant to provide the responding party with legal advice or guidance regarding its view as to what machinery falls within the scope of the terms "cranes", "shovels", "bulldozers" and "similar equipment", or who it believes was operating such machinery on the application filing date. If the responding party was caused "some difficulty" determining where its employees fell because of the bargaining unit description, this is something that it should have discussed with its legal counsel. Judgment calls of this nature have to be made when preparing a response in many applications for certification in the construction industry. The responding party cannot just throw up its hands and refuse to file a list because of the difficulty in assessing which list one or more of its employees ought to be on.

54. The responding party's failure to appreciate the distinction being drawn by the IUOE (referred to above in paragraph 31(d)) is also insufficient to warrant the exercise of the Board's discretion. A similar observation regarding LIUNA's applications is also made in the responding party's submissions (referred to above in paragraph 31(e)). This appears to arise from the confusion that the responding party has regarding bargaining unit descriptions in the construction industry, discussed above. The responding party's description of the two Board Files is, in fact, inaccurate. In Board File No. 1541-07-R, the IUOE initially claimed a bargaining unit consisting of all operating engineers in the employ of Clean Water Works in the ICI sector of the construction industry, and all other operating engineers in the employ of Clean Water Works in all other sectors of the construction industry in Board Areas 14 and 15. It did not claim bargaining rights for Board Area 13, and it was not required to do so. In its submissions to the Board, however, the IUOE has agreed to include Board Area 13 in the unit as requested by the responding party. As noted above, in Board File No. 1542-07-R, the IUOE claims a bargaining unit consisting of all operating engineers in the employ of Clean Water Works in all sectors of the construction industry other than the ICI sector in Board Area 26. Because it is not necessary in the construction industry to have employees working in the ICI sector in order to obtain a certificate for the ICI sector, and because it is not necessary for the applicant to claim non-ICI bargaining rights for all Board Areas in which the responding party has employees working, the fact that the responding party was performing work of the same nature in Board Areas 13, 14, 15 and 26 is consistent with the position taken by the IUOE. In any event, the responding party is responsible for filing its response with a full list of individuals in the bargaining unit claimed by the applicant. Its confusion over the rationale for the applicant's applications cannot justify it from not doing so.

55. Clean Water Works also asserts that LIUNA and the IUOE claimed the same individuals as being employed by it in two separate bargaining units on the application date. As noted above, that may well be the case – there is often a thin line that can be drawn between the work of a construction labourer and the work of an operating engineer, and both the IUOE and LIUNA may believe that the individual was at work in its bargaining unit on the application date. However, even if LIUNA and the IUOE do claim that the same employee or employees were in two or more units on the same date (something that will not become known to the responding party until after the response is due to be delivered by the responding party in any event), the responding party must still identify, as best it can, the appropriate names for inclusion on its list in response to each application for certification.

56. With respect to the prejudice asserted by the applicants, Clean Water Works asserts that neither applicant can really show any prejudice here, because with respect to at least some of the

applications the applicants claim to have signed up all individuals in the bargaining unit. It is observed by Clean Water Works that the applicants did not raise the absence of the lists of employees until the Regional Certification Meetings. In that regard, it is noted by Clean Water Works that it provided the applicants with a "best estimate" of employees in the described bargaining units in its responses, and it asserts that it advised of all potential employees in each Board Area and throughout the province when it filed its list in Board File No. 1550-07-R.

57. The difficulty that the Board has with the submission made by Clean Water Works is that it effectively trivializes the real prejudice arising to the applicants of it not delivering responses with the required lists of employees. As noted by the Board in a number of cases (such as *Iori Plaster*, *Reids Uptown Homes*, and *Struct-Con Construction*, all cited above), the ability of a union to investigate the different state of affairs identified by the responding party in its response typically diminishes rapidly as time progresses. By the time that the applicant receives the responding party's response, the composition of the work force, its location and the nature of the work being done by individuals on a construction site may be entirely different than it was on the application filing date. As noted above, the Board takes notice of this fact as a reality of the nature of the employment relationship in the construction industry.

58. In that context, it is incomprehensible to the Board that Clean Water Works can assert that identifying the employees that should be on the Schedule "A" list of employees for each Board File some 30 days after the application filing date can be anything other than extremely (if not fatally) prejudicial to the applicants' applications. An entire month had passed before the names of employees in each unit were offered by the responding party. By that time, it would have been almost impossible for the applicants to have been able to determine whether the allegations of fact made by the responding party (i.e. who the individuals were, the unit they were working in, and their classification) were accurate. The applicants would have been required, at that time, to reconstruct exactly what the individuals identified by the responding party were actually doing on the certification application date. In this regard, it is critical to appreciate that in the construction industry who "counts" for the purposes of casting a ballot (in a vote-based application) or for considering an application for membership (in a card-based application) is determined by reference to who was actually at work in the bargaining unit on the application date. In a situation such as this one, in which both the IUOE and LIUNA have applied for certification, the particular unit in which each individual employee will be employed will be determined by reference to what he or she was actually doing for the majority of his or her working day on the application filing date. Attempting to piece together an entire month after the fact who was at work, what they were actually doing, and for how long they were doing it in circumstances where individuals were on an active construction site performing various tasks at different times without contemporaneously recording same is for all intents and purposes impossible.

59. Notwithstanding that Clean Water Works asserts that it provided its "best estimate" of employees to the applicants in its responses, it appears that those "best estimates" were not particularly helpful when one reviews them in hindsight. In Board File No. 1541-07-R, the applicant asserted that there were seven persons in the bargaining unit. In its response, Clean Water Works asserted that there was one employee in the unit. However, its response was ambiguous at best, as it answered question four on the response form ("Number of employees who were at work in the unit proposed by the applicant on the Application Filing Date") by identifying seven such employees. In Board File No. 1542-07-R, the situation is similar – the applicant asserted that two people were in the unit, and the responding party's best estimate was that there was only one person in the unit.

However, it also identified two people as being employed in the unit proposed by the applicant on the Application Filing Date. The same result holds true in Board File No.1543-07-R and in Board File No. 1544-07-R. Ignoring the ambiguity, Clean Water Works has not provided any information with its response that would have assisted the applicants in identifying who was "in play" in any of the given proceedings. In effect, the applicants here have been precluded from being able to confirm, one way or the other, whether they had majority support of the employees in the bargaining unit, or to determine whether the voters list should be composed of individuals other than those who it believed should be on the list of voters. There is immeasurable prejudice here to the applicants, keeping in mind the potential for a bar to further applications for certification should the applicants determine to withdraw their applications for certification at this time.

60. The fact that the applicants did not complain or assert any rights regarding the absence of lists for each of these applications until the Regional Certification Meetings does not, as asserted by Clean Water Works, allow for the conclusion that there is no prejudice to the applicants. It is not the responsibility of the applicants to demand from the responding party that a complete response be filed with the Board, or to remind the responding party that it has not provided a list of employees as required by the Act and the Board's Rules of Procedure. Nor must the applicants warn the responding party that it may be prejudicing its ability to file a full response by not doing so at first instance in accordance with the Act and the Board's Rules. The obligation to file a list of employees with the response is that of the responding party alone. In these proceedings, if Clean Water Works chooses not to do so, the consequences of making that choice fall to Clean Water Works.

61. As noted above, Clean Water Works asserts that time was not of the essence for the applicants, as it filed the construction certification applications on August 2, 2007, but determined not to deliver them until August 7, 2007. Clean Water Works asserts that the five day gap reflects that the applicants exercised no diligence in preserving their own ability to verify status issues.

62. To a limited extent, the position taken by Clean Water Works has merit. The Act requires that the responses and their Schedule "A" lists of employees be delivered to the applicants and filed with the Board within two days of delivering the application. Here, if the responding party delivered its full responses and filed same with the Board within the two day time period, any prejudice that would have been caused to the applicants as a result of them choosing August 2, 2007 as the application filing date and then waiting until August 7, 2007 to deliver their applications is prejudice that the applicants would have to have borne. But there is nothing before the Board to suggest that, had the responding party filed full responses with lists of employees on August 9, 2007, the applicants would have secured no information had it investigated the positions taken by the responding party at the time. If, in fact, the applicants would have been unable to secure the information it needed in those circumstances, that result would have been something that the applicants would have had to live with. Here, though, the responding party, by not filing full responses with the Schedule "A" lists of employees, has effectively precluded itself from taking advantage of that argument. The applicants would have to live with the effect of the consequences of the delay from August 2, 2007 to August 9, 2007. They are not responsible for the delay from August 10, 2007 to September 5, 2007. There is no way to determine what information the applicants would have secured had proper responses been delivered. It is the responding party that must bear the consequences of that delay.

63. Finally, I believe it is necessary to deal briefly with the argument raised by the responding party that should the Board not exercise its discretion to consider the late-filed information filed by it,

the Board "may be countenancing and facilitating a certification by fraud" because the applicants claim that three particular employees should be entitled to vote or have their cards counted in respect of applications relating to two geographically distant Board Areas. In effect, it is asserted that the applicants are misrepresenting the situation to the Board because it is not physically possible for someone to be at work for the majority of the working day in two or more Board Areas that are geographically distant.

64. I do not believe this argument to be sound. It is true that it is not physically possible to be at work for the majority of the working day in two (or more) Board Areas that are geographically distant. However, as noted above, trade unions may have imperfect information regarding the location of where all of its members are working and what it is that they are doing on the application filing date. Accordingly, it is not unusual in circumstances such as those here for an applicant to propose that the individual have the right to vote and/or have his or her membership evidence counted in more than one application, and then wait until the status issues are resolved at a hearing to determine in which bargaining unit the individual in fact belongs. Acting on imperfect information is not the same as acting fraudulently. This same lack of perfect information also affects responding party employers. In fact, a review of the proposed lists of employees prepared by the responding party and delivered to the Board in these Board Files (with the exception of Board File No. 1550-07-R) reflects numerous individuals who the responding party asserts were in more than one of the bargaining units on the application filing date – essentially the same "fraudulent" behaviour that it asserts the applicants are engaging in.

65. For these reasons, I am of the view that it is not appropriate for the Board to exercise its discretion pursuant to sections 7(14) and 128.1(3) of the Act to consider the list of employees proposed to be added to the responses at the Regional Certification Meetings. The applications will be determined by reference to the information provided to the Board by the applicants with their applications.

The Result

Board File No. 1543-07-R

66. For reasons that will become clearer below, I will deal with Board File No. 1543-07-R first.

67. As noted above, Board File No. 1543-07-R is a construction industry certification application filed on August 2, 2007 by LIUNA pursuant to section 128.1 of the Act.

68. For the reasons set out above, the Board finds that the bargaining unit requested by the applicant is appropriate for bargaining. The appropriate bargaining unit description is as follows:

> all construction labourers in the employ of Clean Water Works Inc. in all sectors of the construction industry, in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, except non-working foreperson and persons above the rank of non-working foreperson.

69. For the reasons set out above, the Board is not prepared to exercise its discretion to permit Clean Water Works to add individuals to the list of employees. Accordingly, the list of employees will be determined by reference to the five names properly put on the list of employees by LIUNA at the Regional Certification Meeting. The list of employees proposed by LIUNA at the Regional Certification Meeting consists of the following individuals:

B. Desormeaux
R. Higgs
S. Laube
D. Sarazin
S. Kelly

70. LIUNA acknowledges in its written submissions that S. Kelly was not at work in the bargaining unit on the application filing date. It asserts that he was not at work on that date as a result of his discharge by Clean Water Works, the legality of which is before the Board in the applicants' unfair labour practice complaint. In these circumstances, Mr. Kelly should be excluded from the list of employees until it is determined by the Board that he is properly included thereon.

71. In its submissions to the Board dated September 20, 2007, counsel for LIUNA stated that based on the submissions by Clean Water Works on this Board File dated September 17, 2007, there appeared to be an agreement between Clean Water Works and LIUNA that Messrs. Desormeaux, Higgs, Laube and Sarazin worked in Board Area 26 performing bargaining unit work on the application filing date. In fact, the submissions of Clean Water Works do appear to reflect such an agreement. As a result, LIUNA submitted that "the Board may be able to determine this matter pursuant to section 128.1 without inquiry into the remaining status issues". Without prejudice to LIUNA's remedies pursuant to its section 96 complaint, it requested that the Board "determine this matter pursuant to section 128.1 of the Act, as it is entitled to do, based on the information provided by [LIUNA] in this matter".

72. I have reviewed the membership evidence filed by LIUNA in this proceeding. On the basis of only the information provided in the application (including the information and membership evidence filed by LIUNA), the Board is satisfied that more than fifty-five percent of the employees agreed to be in the bargaining unit were members of LIUNA on the date the application was filed. LIUNA filed membership evidence on behalf of four persons, all of whom it claims are employees in the bargaining unit.

73. LIUNA has asked that it be certified pursuant to section 128.1 of the Act relying solely on the number of persons in the bargaining unit who are its members. It is entitled to do so under section 128.1. There are no other issues remaining in dispute that would cause the Board to dismiss the application or to consider directing a representation vote.

74. The Board has received no objection from any employee within the time set out in the Notice to Employees provided to the responding party for posting.

75. The Board is satisfied that it should certify LIUNA.

76. Therefore, pursuant to subsection 128.1(13) of the Act, a certificate will issue to the applicant trade union, LIUNA, in respect of all construction labourers in the employ of Clean Water

Works Inc., in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working foreperson.

Board File No. 1541-07-R

77. As noted above, this Board File is a construction industry certification application filed on August 2, 2007 by the IUOE pursuant to section 8 of the Act. For the reasons outlined in the decision of the Board dated August 10, 2007, no representation vote was ordered.

78. For the reasons set out above, the Board finds that the bargaining unit requested by the applicant (as amended by its correspondence dated September 17, 2007) is appropriate for bargaining. The appropriate bargaining unit description is as follows:

> all employees of Clean Water Works Inc. engaged in the operation of cranes, shovels, bulldozers, or similar equipment and those engaged in repairing and maintaining of same, and employees engaged as surveyors, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foreperson and persons above the rank of non-working foreperson and all employees of Clean Water Works engaged in the operation of cranes, shovels, bulldozers, or similar equipment and those engaged in repairing and maintaining of same, and employees engaged as surveyors, in all other sectors of the construction industry in the County of Lanark, the geographic Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville, the County of Renfrew, and the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foreperson and persons above the rank of non-working foreperson.

79. For the reasons set out above, the Board is not prepared to exercise its discretion to permit Clean Water Works to add individuals to the list of employees. Accordingly, the list of employees will be determined by reference to the names properly put on the list of employees by the IUOE at the Regional Certification Meeting. The list of employees proposed by the IUOE at the Regional Certification Meeting consists of the following individuals:

A. Charbonneau
B. Desormeaux
R. Higgs
S. Laube
D. Sarazin
M. White
S. Kelly
J. Mitchell

80. For the purposes of an application for certification in the construction industry, it is usually not possible for an individual to be in two construction industry bargaining units on the same

application filing date, because the Board determines an individual's inclusion in a construction industry bargaining unit by reference to the work the individual actually performed for a majority of his or her working day on the application filing date. In Board File No. 1543-07-R, the Board has found, on the agreement of LIUNA and Clean Water Works, that certain individuals were working in that particular LIUNA bargaining unit on August 2, 2007, the application filing date. Those individuals would usually be excluded from this IUOE bargaining unit, given that this application and the above-referenced application were filed with the Board on the same date.

81. Here, however, the circumstances potentially lead to a different conclusion. Although LIUNA and Clean Water Works have agreed, for the purposes of Board File 1543-07-R, that Messrs. Desormeaux, Higgs, Laube and Sarazin were employees in the bargaining unit described in that proceeding on the application filing date, the IUOE is not a party to that agreement. The IUOE has not conceded that those four individuals were not operating engineers on the application filing date, is not bound by the agreement reached by LIUNA and Clean Water Works, and asserts that the four individuals were working in the unit of operating engineers found to be appropriate for bargaining in this proceeding. As Clean Water Works did not file a timely response, including the Schedule "A" list of employees, the list of employees eligible to cast a ballot is determined by reference to the names put on the list by the IUOE, set out above at paragraph 79.

82. The IUOE acknowledges in its written submissions that S. Kelly was not at work in the bargaining unit on the application filing date. It also acknowledges that J. Mitchell was not at work in the bargaining unit on the application filing date, for the same reason as Mr. Kelly - it asserts that he was not at work on that date as a result of his unlawful discharge by Clean Water Works. The legality of his discharge is also before the Board in the unfair labour practice complaint. In these circumstances, both Mr. Kelly and Mr. Mitchell should be excluded from the list of employees until it is determined by the Board that they are properly included thereon.

83. As a result, the list of employees for the purposes of this application for certification currently consists of the following individuals:

A. Charbonneau
B. Desormeaux
R. Higgs
S. Laube
D. Sarazin
M. White

84. It appears to the Board on an examination of only the information provided in the application and the information and membership evidence filed by the applicant that not less than forty per cent of the individuals in the bargaining unit proposed in the application for certification were members of the union at the time that the application was made.

85. Having regard to the Board's finding as to the appropriate bargaining unit, the Board directs that a representation vote be taken of the individuals in the following voting constituency:

> all employees of Clean Water Works Inc. engaged in the operation of cranes, shovels, bulldozers, or similar equipment and those engaged in repairing and maintaining of same, and employees engaged as surveyors, in the industrial, commercial and institutional sector of the construction industry in the

> Province of Ontario, save and except non-working foreperson and persons above the rank of non-working foreperson and all employees of Clean Water Works engaged in the operation of cranes, shovels, bulldozers, or similar equipment and those engaged in repairing and maintaining of same, and employees engaged as surveyors, in all other sectors of the construction industry in the County of Lanark, the geographic Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville, the County of Renfrew, and the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foreperson and persons above the rank of non-working foreperson.

86. The vote will be held on a date to be determined by the Manager of Field Services, in conjunction with the parties.

87. The individuals who are identified above in paragraph 83 are eligible to vote. Mr. Kelly and Mr. Mitchell will also be entitled to cast a ballot. Voters will be asked whether or not they wish to be represented by the IUOE in their employment relations with the responding party. As explained in more detail below, there appears to be an issue raised regarding the actual bargaining unit in which each of the voters was working on the application filing date. Accordingly, each ballot cast will be segregated.

88. Clean Water Works has disputed the IUOE's estimate of the number of employees in the IUOE's proposed bargaining unit. It gives notice under section 8.1 of the Act. Although the applicant appears to have established sufficient membership support in the bargaining unit for the purposes of obtaining a representation vote, there is the possibility that less than 40 per cent of the individuals on the list of employees may actually have been working in the bargaining unit on the application filing date. In the circumstances, the ballot box will be sealed pursuant to section 8.1 of the Act, until the Board orders otherwise or the parties agree.

89. Any party or person who wishes to make representations to the Board about any issue relating to the application for certification which remains in dispute must file a detailed statement of representations and all materials facts upon which they rely with the Board and deliver it to the other parties, so that it is received within five (5) days (excluding Saturdays, Sundays and holidays on which the Board is closed) of the date on which the vote is taken.

Board File No. 1542-07-R

90. As noted above, this Board File is a construction industry certification application filed on August 2, 2007 by the IUOE pursuant to section 128.1 of the Act.

91. For the reasons set out above, the Board finds that the bargaining unit requested by the applicant is appropriate for bargaining. The appropriate bargaining unit description is as follows:

> all employees of Clean Water Works Inc. engaged in the operation of cranes, shovels, bulldozers, or similar equipment and those engaged in repairing and maintaining of same, and employees engaged as surveyors, in all sectors of the construction industry in the City of Hamilton, the City of Burlington, that

> portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, except non-working foreperson and persons above the rank of non-working foreperson.

92. For the reasons set out above, the Board is not prepared to exercise its discretion to permit Clean Water Works to add individuals to the list of employees. Accordingly, the list of employees will be determined by reference to the names properly put on the list of employees by the IUOE at the Regional Certification Meeting. The list of employees proposed by the IUOE at the Regional Certification Meeting consists of the following individuals:

B. Desormeaux
[illegible] Higgs
[illegible] Laube
D. Sarazin
S. Kelly

93. As noted above, for the purposes of an application for certification in the construction industry, it is usually not possible for an individual to be in two construction industry bargaining units on the same application filing date. In Board File No. 1543-07-R the Board has found, on the agreement of LIUNA and Clean Water Works, that certain individuals were in a LIUNA bargaining unit on August 2, 2007, the application filing date. Those individuals normally would not also be included in this IUOE bargaining unit, because this application was filed with the Board on the same date as that in Board File No. 1543-07-R.

94. For the reasons outlined above in paragraph 81, the circumstances here potentially dictate a different result. At the Regional Certification Meeting, the IUOE identified Messrs. Desormeaux, Higgs, Laube and Sarazin as belonging to the Schedule "A" list of employees for the purposes of assessing the IUOE's support in this proceeding. For the reasons outlined in this decision, the IUOE is entitled to do so. That said, each of Messrs. Desormeaux, Higgs, Laube and Sarazin cannot be in *both* of the IUOE bargaining units (i.e. Board Files No. 1541-07-R and 1542-07-R) on the same application filing date. Accordingly, it will be necessary for the Board to determine which of the two units each of the four individuals above was actually working in, if any, on the application filing date.

95. The Board is not able to determine the percentage of employees in the bargaining unit who were members of the IUOE as of the date the application was filed. This assessment will be determined after a hearing is held to consider the evidence and argument of the parties.

96. Mr. S. Kelly is also proposed to be added to the list of employees in this proceeding. As noted above, the IUOE acknowledges in its written submissions that Mr. Kelly was not at work in the bargaining unit on the application filing date as a result of his discharge by Clean Water Works. The legality of his discharge is also before the Board in the unfair labour practice complaint. In these circumstances, Mr. Kelly should be excluded from the list of employees until it is determined by the Board that he should be properly included thereon.

Board File No. 1544-07-R

97. As noted above, Board File No. 1544-07-R is a construction industry certification application filed on August 2, 2007 by LIUNA pursuant to section 8 of the Act. For the reasons outlined in the decision of the Board dated August 10, 2007, no representation vote was ordered.

98. For the reasons set out above, the Board finds that the bargaining unit requested by the applicant is appropriate for bargaining. In its written submissions dated September 17, 2007, LIUNA agreed with the position taken by Clean Water Works that the appropriate bargaining unit would include Board Area 13. Accordingly, the appropriate bargaining unit description is as follows:

> all construction labourers in the employ of Clean Water Works Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foreperson and persons above the rank of non-working foreperson and all construction labourers in the employ of Clean Water Works in all sectors of the construction industry other than the industrial, commercial and institutional sector, in the County of Lanark, the geographic Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville, the County of Renfrew, and the City of Ottawa and the United Counties of Prescott and Russell, save and except non-working foreperson and persons above the rank of non-working foreperson.

99. For the reasons set out above, the Board is not prepared to exercise its discretion to permit Clean Water Works to add individuals to the list of employees. Accordingly, the list of employees will be determined by reference to the names properly put on the list of employees by LIUNA at the Regional Certification Meeting.

100. Counsel for LIUNA asserted in his correspondence dated September 17, 2007 that at the Regional Certification Meeting LIUNA proposed to add eight individuals to the list of employees (individuals listed as numbers 1 (A. Charbonneau), 7 (B. Desormeaux)14 (R. Higgs), 21 (S. Laube), 26 (D. Sarazin), 32 (M. White), 37 (S. Kelly) and 38 (J. Mitchell). The Certification Worksheet executed by LIUNA's counsel reflects something quite different. In fact, the Certification Worksheet identifies challenges to numbers 1 (A. Charbonneau), 7 (B. Desormeaux), 14 (R. Higgs), 21 (S. Laube), 26 (D. Sarazin), and 32 (M. White). That is, the applicant objected to these latter individuals being added to the list of employees. The list of employees actually proposed by LIUNA at the Regional Certification Meeting consists of the following two individuals:

> S. Kelly
> J. Mitchell

101. As noted above, for the purposes of an application for certification in the construction industry, it is impossible for an individual to be in two construction industry bargaining units on the same application filing date. The list of employees proposed by LIUNA must only contain individuals who were performing the work of a construction labourer and were not in any other construction industry bargaining unit on the application filing date.

102. LIUNA has conceded that neither Mr. Kelly nor Mr. Mitchell were at work in this bargaining unit on the application filing date, but assert that their employment with Clean Water Works was unlawfully terminated. Should it be determined that both Mr. Kelly and Mr. Mitchell were terminated from employment for unlawful reasons, and should it be determined that they would have both been performing bargaining unit work in this particular bargaining unit on the application filing date but for their termination from employment, LIUNA may be able to establish the appearance of 40 per cent support required to warrant the taking of a representation vote in. Alternatively, LIUNA may be able to secure a remedial certificate pursuant to section 11 of the Act. In any event, having regard to section 8(2) of the Act, no representation vote is appropriate at this time, as no appearance of 40 per cent support has been established by LIUNA; see *K.D. Clair Construction Ltd.*, [2007] CanLII 52273.

103. This proceeding will be scheduled for hearing.

Board Files No. 1549-07-R and 1550-07-R

104. As noted above, Board File No. 1549-07-R is an industrial certification application filed on August 7, 2007 by LIUNA pursuant to section 8 of the Act, relating to employees of Clean Water Works employed in Ottawa. For the reasons outlined in the decision of the Board dated August 10, 2007, no representation vote was ordered. Board File No. 1550-07-R is an industrial certification application filed on August 7, 2007 by LIUNA pursuant to section 8 of the Act relating to employees of Clean Water Works employed in Burlington. A representation vote was directed by the Board in its decision dated August 10, 2007 of individuals in the following voting constituency:

> all employees of Clean Water Works Inc. and J.D. Brule Investments Holding Ltd. employed in the Province of Ontario, save and except office, clerical and sales staff, foremen and persons above the rank of foreman.

105. As noted above, the parties have since agreed that the name of the responding party is Clean Water Works.

106. LIUNA asserted in its responses to both these proceedings that Clean Water Works operates in the construction industry and that its construction applications for certification (Board Files 1543-07-R and 1544-07-R) are the relevant proceedings that will determine the right of LIUNA to represent employees of Clean Water Works. However, in the event that the Board were to determine that the operations of Clean Water Works are not within the construction industry, in whole or in part, LIUNA asserted that these industrial proceedings should govern its right to represent some or all of employees of Clean Water Works.

107. As the parties have agreed that the proper responding party to these proceedings is Clean Water Works, and as Clean Water Works acknowledges in its responses to the various applications before the Board that it operates in the construction industry, it is not evident that it is necessary to make any further determinations with respect to these two applications. Should LIUNA desire that these applications proceed, it should advise the Board of that desire and the reasons why they should proceed.

Remaining Issues

108. There remain a number of issues to be determined in these proceedings. The identity of the particular bargaining unit that certain individual employees were working in on the application filing date must be determined. The employee status and/or eligibility to vote of certain individuals is also in question. There is also an unfair labour practice application (Board File No. 1690-07-U) in which relief is requested by the IUOE and LIUNA pursuant to section 11 of the Act.

109. The status issues that are outstanding relate to six individuals – Messrs. Desormeaux, Higgs, Kelly, Laube, Mitchell and Sarazin. The applicants have asserted in the unfair labour practice application that the employment of Mr. Kelly and Mr. Mitchell was terminated contrary to the provisions of the Act. The reverse burden provisions of the Act would normally require Clean Water Works to proceed first in presenting its case in that proceeding.

110. In these circumstances, it appears to be appropriate to deal with the pure status issues first – the status of Messrs. Desormeaux, Higgs, Laube and Sarazin. The unfair labour practice application, and the status of Mr. Kelly and Mr. Mitchell, will be dealt with subsequently. There are no circumstances here to suggest that anything other than the normal approach be adopted to the hearing of evidence relating to the remaining issues in the certification proceedings. Accordingly, in accordance with Board Information Bulletin No. 9, at the hearing of these proceedings the applicants will proceed first and call all of their evidence with respect to the status issues raised regarding Messrs. Desormeaux, Higgs, Laube and Sarazin. Once the applicants have completed their evidence, Clean Water Works can call its evidence relating to the status issues. The applicants can call any proper reply evidence once Clean Water Works has completed its case.

111. Any other issues that are raised by the parties to these proceedings will be dealt with during the course of hearing the proceedings on their merits.

112. For the reasons set out above:

(a) a certificate will issue to LIUNA with respect to Board File No. 1543-07-R;

(b) Board File No. 1541-07-R is referred to the Manager of Field Services for the purposes of consulting with the parties and arranging for a representation vote;

(c) Board File Nos. 1541-07-R, 1542-07-R, 1544-07-R and 1690-07-U are referred to the Registrar for the setting of hearing dates to consider the remaining issues in those proceedings; and

(d) Board Files 1549-07-R and 1550-07-R are adjourned *sine die* for a period not to exceed three months from the date of this decision. LIUNA is to advise the Board whether there is any reason why those proceedings should be processed further. Should the Board not be advised by LIUNA that these two proceedings should be processed further within the three month period referred to above, these applicatons will be dismissed without notice and without any further action by the Board.

113. In the circumstances, I will remain seized of these proceedings.

2362-06-R Labourers' International Union of North America Ontario Provincial District Council, Applicant v. **Ellwood Robinson Limited**, Responding Party

Certification – Construction Industry – Status – The Board held that three employees performing grading work on gravel roads and surfaces were engaged in maintenance and not repair, and therefore they were excluded from the construction bargaining unit the applicant was seeking – The maintenance work involved fixing potholes and leveling the surfaces on roads, driveways and in a parking lot – No new material was added or taken away, and the surfaces were at all times functional before, during and after the work was performed – Matter continues

BEFORE: *Marilyn Silverman*, Vice-Chair.

APPEARANCES: *Eli Gedalof* and *Adrian Tessier* appearing for the applicant; *Chris Fiore, Allan West* and *Dave Jones* appearing for the responding party.

DECISION OF THE BOARD: March 12, 2008

1. This is an application for certification filed under section 128.1 of the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The applicant seeks certification on the basis of the membership evidence it has filed.

2. The bargaining unit the applicant seeks is:

> all construction labourers, operating engineers and operating engineers' apprentices in the employ of the Responding Party in all sectors of the construction industry, save and except the industrial, commercial and institutional sector, in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and those above the rank of non-working foreman.

3. There were many status disputes in this application. The parties have made certain agreements and the Board, after receiving written submissions, issued a decision dated November 2, 2007 determining one of the disputed positions.

4. This decision deals with disputes over the work of three individuals: Kurt Barr, Tom Horne and Ken Ladouceur. The responding party (the "company" or "Ellwood") contends that these men were performing bargaining unit work on the application filing date, October 27, 2006 and were in the bargaining unit. The applicant argues that these men were doing road maintenance and not construction work on that date and should be excluding from the unit.

5. It is agreed that these three individuals worked for the responding party on the application filing date and were paid for that work on their usual hourly basis. The individuals testified from their recollections augmented by their time sheets.

6. I heard evidence from the three individuals and from the Vice-President and General Manager of the company, David Jones. Although Mr. Jones was not on the sites at issue on the date of application for certification, he was familiar with the jobs and generally responsible for the work performed. There was complete consistency in the evidence of all the witnesses as to what work was performed. The only issue for determination is how that work is to be characterized and specifically whether it is work that falls within the definition of construction under section 1(1) of the Act. If the work is repair, it is construction. If it is in the nature of maintenance work, it is not.

Kurt Barr

7. Mr. Barr worked 9 hours on October 27, 2006 and did grading for 5.5 hours. He performed this work at a Domtar site. The remainder of the day was spent on what the parties have agreed was construction work.

8. At the Domtar site, Mr. Barr was grading an employee parking lot, a driveway and a back lot. These surfaces were gravel. He described the machine he used as a road grader. That machine has hydraulic cylinders and a blade to move material. Mr. Barr said there were a number of potholes to deal with. He used the blade on the grader to cut the gravel down into the pothole to eliminate it. This is done by moving the controls on the grader and putting pressure on the blade. Mr. Barr then moved the gravel around to even out the surfaces. In addition to fixing the potholes, Mr. Barr evened out the surfaces of the road and lot. No new material was added to the road.

9. Mr. Barr said that he does work on building new roads and operates the grader the same way no matter what site he is doing. Different work on different sites may require the controls and the grading machines to be used in different ways. Mr. Barr said that the areas he worked on were in fairly bad shape and he was doing this work before the surfaces became impassable.

Ken Ladouceur

10. On October 27, 2006 Mr. Ladouceur was grading on a secondary highway on Ranger Lake Road hours for 5.55 hours. The work was done under contract for the Ministry of Transportation (the "MTO"). Mr. Ladouceur was working with a large size grader and describes the road worked on as poor gravel. He did this work approximately every third week for the past three years. The particular road sees a lot of heavy truck traffic from both the camping areas it services and the fact that it is used as a logging road. There were a number of potholes and sharp corners that required cutting out the potholes from underneath. Mr. Barr then takes the loose gravel, reshapes and spreads it and ensures that the slope of the road is right – he restores it to a 2% slope from the centre to the outside edge. The potholes are dug out and flattened in the same way as Mr. Barr described. The work is performed before the road gets so bad that it cannot be driven on. No flaggers or new material are used. On that particular day the job was time consuming because it involved working on hills. The road was not closed to traffic but it was in poor shape and because of that Mr. Ladouceur was only able to grade a small portion of what he normally would be able to grade.

11. The MTO customer work order from Elwood in relation to this work describes it as "operational services equipment" for the 2006 season, "probably mostly grader rental".

Tom Horne

12. On October 27, 2006 Mr. Horne worked on a secondary gravel road called Poplar Dale Road for most of the day. The work performed was similar to what Mr. Ladoucuer did on Ranger Lake Road. Mr. Horne repaired potholes, and reshaped and resurfaced the gravel road. Again, no new material was brought in on that day, although Mr. Ladouceur said that often there is new material brought in on this road. The process described to repair the potholes is as described above. This work was also done under contract for the MTO.

13. Ellwood produced portions of its contract with the MTO for this work. The documentary evidence produced describes the work in terms of the rental of the grader and specifically in paragraph 2 of that contract as follows:

> A Grader, Plow Equipped for Maintenance Grading and Winter snowplowing for the Aberdeen-McMahon And Galbraith-Morin Locals Roads Boards and Highway 670 together with such other works specified, or embraced, or included in the said Contract Documents.

14. The work order relating to that contract describes the work as:

> "For 3 seasons: Begins October 1, 2006; Ends October 31, 2009.
> Grading = 650 Hours.
> Snowplowing = 450 Hours".

15. Overall, the men said that this work is basically the same work that they would do in constructing a new road surface. They would operate the grader in the same fashion. They described the operation of the controls and the machinery as the same as for a new construction job.

Submissions of the responding party

16. Ellwood refers to the Board's case law in distinguishing between maintenance and repair work. The latter is construction. *The Master Insulators' Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477; *Blastco Corp. (No.1)* [2002] O.L.R.D. No. 3788 (November 7, 2002) and *Blastco Corp. (No. 2)* [2003] O.L.R.D. No. 2820 (August 19, 2003). Those cases established and confirmed the following principle from *Master Insulators* expressed in paragraph 29:

> ... In our view, it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system. Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work. ...

17. The responding party asserts that the work of the three men falls within the definition of work performed in the construction industry. It says that what was described at all the sites was repair work. That is supported by the fact that the roads described were in bad condition; particularly the highways. They were filled with potholes and deteriorating and as a result, unsafe. That is the context that the company says should be used to define the characterization of the work. It is fundamentally the repair of gravel roads. The responding party asserts that this was work that was

"necessary to restore a system or part of a system which has ceased to function or function economically".

18. Ellwood says that the fact that the road was still operational does not mean that the work performed was maintenance work. The company says that here the roads were unsafe, had come to the end of their functional life as designed and as such, were repaired on the date of application.

19. Ellwood focuses on the fact that the work described was the same as on new construction. Potholes were removed and graded over. The gravel was moved and relocated. In the company's submission, this is necessitated because the road services have failed and are no longer performing their proper function. It highlights the case where Mr. Ladouceur had to restore the slope of the road.

Submissions of the applicant

20. The union says that all three men were performing routine maintenance on the application filing date. They were grading pre-existing roads to ensure that those roads did not deteriorate. No material was added or removed, the roads were not closed and the roads were not altered.

21. It relies on the decision in *Matrix Service Inc.*, [2004] O.L.R.D. No. 2446 (August 31, 2004). In that case the Board described the difference between maintenance and repair. The Board found that to parse out small aspects of work, devoid from the context of what is being done, is not a desired approach to this kind of determination. The union contends that I should not look at each task in isolation in this case. It assets that these tasks were performed for the regular maintenance of roads; two of which were done under contracts for maintenance work.

Analysis

22. I begin with the statutory provision found in section 1(1) of the Act, the definition of construction industry:

> **1.** (1) In this Act,
>
> "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site;

23. Looking at the case law and principles set out by *Master Insulators* and *Blastco*, the determination is whether the work is fundamentally in the nature of repair or of maintenance. In *Master Insulators* the Board was addressing the removal and application of insulation to systems or portions of systems. In assessing the work in that case the Board made the oft cited distinction between work to preserve the functioning of a system and work done to restore its function where the system or part thereof has ceased to function. These are sometimes fine distinctions. Those distinctions are informed by the context of the work.

24. Applying those concepts to the work done in the instant case, both the work itself and the context of it support the union's position. The roads were functioning although the potholes and deterioration made them less than ideal. The purpose of the work being performed on October 27,

2006 was to preserve or maintain the roads so that they could continue to operate. It is the kind of work that one contemplates is done to maintain a gravel road which is traveled on. That would be expected because traffic and weather affect the condition of the roads. That conclusion is bolstered by the fact that Ellwood's contracts for these roads with the MOT was precisely for that purpose – to maintain the roads. The grading work is ongoing (under one of the contracts done every three weeks). In addition to grading, the work includes regular snowplowing, further suggesting that the context of this work is maintenance. No new material was added to the roads or the parking lot and driveway. The roads existed and were not closed although in the case of the employee parking lot, it was empty. The work did improve the deteriorating condition of the roads but some improvement must be expected from maintenance.

25. There must be a point on a continuum where a lack of regular maintenance would render a road non-functional such that the work required on it would be construction. This concept is reflected in *Master Insulators* at paragraph 29. " ... adequate and timely maintenance forestalls or reduces the requirement for repair". However, in this case there was no fundamental or functional change, no new materials added or taken away and no suggestion that the road was unusable. It was routine maintenance work.

26. Too, the type of machinery and the method used does not assist in the company's position. The men may well use the same machines in the same way whether or not they are performing repair or maintenance work, but it is the context, the purpose and the fundamental change to the product being worked on that determines whether the work is repair or maintenance.

27. Having considered the evidence and submissions of the parties, and for the reasons given, I find that the work performed by Messrs. Barr, Ladouceur and Horne on the application filing date was maintenance work and not construction. As a result, they are excluded from the count for the bargaining unit described in this application.

28. The parties have five (5) days from the date of this decision to advise the Board as to what is outstanding in this application.

3154-07-R Universal Workers Union, Labourers' International Union of North America Local 183 Applicant v. **Havenwood Homes** and/or Havenwood Homes Limited and/or Havenwood Homes (Barrie) Limited and/or Havenwood Homes (Whitby) Limited, Responding Parties.

Bargaining Unit – Construction Industry – Local 183 applied under s. 158(2) [non-ICI] for a bargaining unit of all construction labourers working in Board Areas 9 and 18 – On the application filing date there were two employees working – one in each Area – The responding party argued that the appropriate bargaining unit under section 158(2) must be a single geographic Board Area, and since there was only one employee in each area, the application must be dismissed pursuant to s. 9(1) – The Board found that the reference to a geographic area in s. 158(2) provides for minimal coverage encompassed in a certificate and does not foreclose the Board from making a determination that a bargaining unit description that goes beyond one geographic area is appropriate – This view is consistent with the

requirement under s. 160 to issue one certificate in the ICI and another in relation to all other sectors in the appropriate geographic area or areas – Application proceeds

BEFORE: *Corinne F. Murray*, Vice-Chair, Board Members *R. Baxter* and *B. Roberts*

DECISION OF THE BOARD; April 24, 2008

1. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") that the applicant elected to have dealt with under section 128.1 of the Act. Havenwood Homes Limited ("HHL"), the only responding party who filed a response, challenges the applicant's right to be certified on the basis that the "minimum bargaining unit constituency" required by subsection 9(1) of the Act has not been satisfied. This decision deals with the submissions of the applicant and HHL on this issue.

Facts and Arguments

2. The applicant applied under subsection 158(2) of the Act for a bargaining unit of all construction labourers in all sectors of the construction industry, other than the industrial, commercial and institutional (ICI) sector, working in two geographic areas ("Board Area No. 9 and Board Area No.18"). The applicant claims that that there were two employees at work in its proposed bargaining unit on the application filing date. There is no dispute between the parties that one employee was at work that day on a site in Whitby (i.e. within the geographic area known as Board Area No. 9) and the other on a site in Barrie (within the geographic area known as Board Area No. 18).

3. HHL takes no issue with the applicant's description of the work performed by those the applicant seeks to represent. It proposes two bargaining units of construction labourers, one for Board Area No. 9 and the other for Board Area No. 18 because each of these geographic areas constitute a bargaining unit, particularly for the purposes of satisfying the requirements of subsection 9(1) of the Act. HHL's primary argument is that subsections 128(1) and 158(2) of the Act together establish that "the appropriate unit for collective bargaining" in an application for certification under subsection 158(2) of the Act must be a single geographic area. The Board thus cannot extend a bargaining unit beyond the boundaries of one geographic area in such applications. Since neither of the two bargaining units involved in this application satisfy the requirement in subsection 9(1) of the Act that each one have more than one person at work, the application must be dismissed.

4. HHL argues that an application under subsection 158(2) of the Act for a bargaining unit composed of more than one geographic area does not result in the sort of "melding" found by the Board in *Swift Railroad Contractors Corporation,* [2006] O.L.R.D. No. 3646 (October 4, 2006) with respect to applications under subsection 158(1) of the Act. HHL also contrasts applications under subsection 158(1) of the Act ("ICI application") with those under subsection 158(2) (non-ICI application) on the basis that under the former there is no requirement for the workers to have been performing non-ICI work in the geographic area(s) included in the application on the application filing date whereas in applications under subsection 158(2) the Board has always required that there be workers performing such non-ICI work in each geographic area. (see *Primeline Plumbing Ltd.*, [2001] OLRB. Rep. Sept./Oct. 1240 (October 22, 2001). No. 4268 at paragraph 8; appl. for reconsid. dism'd [2001] O.L.R.D. No. 4473 (November 8, 2001)).

5. The applicant asserts that HHL has not provided any authority for the proposition that a bargaining unit cannot extend beyond the geographic limits of one Board Area to include another Board Area. The opposite proposition of the Board not limiting applications under subsection 158(2) of the Act to a single geographic area is clearly stated in a line of decisions starting with *Primeline Plumbing Ltd., supra*; *Royal Overhead Doors Ltd.*, [2004] O.L.R.D. No. 2594 (July 12, 2004) (reconsid. dism'd [2004] O.L.R.D. No. 1661 (July 13, 2004)); *H.C. Steelman Inc.*, [2005] O.L.R.D. No. 3871 (September 22, 2005) and *Turnay Electric Ltd.*, [2005] O.L.R. D. No. 3435 (August 23, 2005).

6. The applicant concedes that if it had applied for two bargaining units with only one employee at work in each, subsection 9(1) of the Act would be cause for dismissal of each. The applicant asserts that in the same way as the Board interpreted the statutory language of subsection 158(1) of the Act in *Swift Railroad Contractors Corporation supra*, the "unit" it proposes in its application is indivisible, though composed of two geographic areas.

7. The applicant highlights that the Act only requires the Board to be satisfied that the applicant's proposed bargaining unit is an appropriate one, not the most appropriate. HHL provides no reason to reject the applicant's unit on the basis that it is inappropriate. Its interpretation of the Act is plainly an opportunistic attempt to shield itself from certification by the applicant in these circumstances and in the results ends up denying these employees their right under the Act to choose the applicant as their bargaining agent.

8. HHL addresses the applicant's arguments mainly by distinguishing the decisions cited by the applicant as situations where the employer did not oppose the multiple geographic areas being dealt with simultaneously, by the Board, as an administrative matter in one application. HHL relies on a brief decision of the Board in *Newman Bros. Limited*, [1979] OLRB Rep. Oct. 1017 as support for its proposition that the Board has traditionally dealt with each geographic area as separate bargaining units in the context of certification applications in the construction industry that includes more than one geographic area. The following segment from that decision is HHL's prime demonstration of the correctness of its submissions with respect to geographic areas being discrete bargaining units:

> "The Board wishes also to point out that its general practice in exercising its authority under subsection 108(1) of the Act [now subsection 128 (1)] is not to describe an appropriate unit in terms of more than one board area even if the applicant has membership support adequate for certification or for a representation vote in more than one board area. Its general practice is to certify or direct a representation vote, depending upon the membership evidence, in each geographic area.

9. In HHL's view, this practice is consistent with the "structure of non-ICI bargaining" and representation being determined on the basis of each geographic area. *Primeline Plumbing Ltd., supra*, and other decisions cited by the applicant deal with multiple geographic areas within one application because for the Board to insist upon multiple applications for certification where the requisite support exists in each geographic area would make "form rule over substance". To the extent that these decisions may overrule the Board's earlier practice, as articulated in *Newman Bros. Limited, supra*, HHL says that the Board's application of the requirement under subsection 9(1) of the Act that an applicant union have the "minimum constituency" of more than one worker for each of the geographic areas nevertheless should not be affected. HHL finds support for its argument based

upon *Newman Bros. Limited* in the Board's approach to displacement applications dealt with in *Brick and Allied Craft Union of Canada,* [2004] OLRB Rep. Sept./Oct. 871 (October 14, 2004) as well as in vote directions in other displacements, in the brick industry as well as others, with respect to the segregation and counting of representation votes.

10. HHL also finds support for its submissions on subsection 158(2) of the Act by a comparison with the language used in the section 135, accreditation provision of the Act; if certification of a bargaining unit composed of multiple geographic areas had been contemplated and/or geographic areas could be combined in the way suggested by the applicant, words such as those used in subsection 135(1) of the Act, i.e., "but the Board need not confine the unit to one geographic area or sector but may, if it considers it advisable, combine areas or sectors or both or parts thereof", would have been inserted in subsection 158(2) and/or subsection 128(1) of the Act. To the same effect, HHL also notes the lack of the use of plurals in subsection 158(2) of the Act.

Issue

11. The question raised by these arguments is whether, for the purposes of subsection 9(1) of the Act, an application for certification under subsection 158(2) of the Act for representation of workers in two geographic areas ought to be considered as one bargaining unit or two.

Decision

12. This question is novel and requires examination of the Board's interpretation of subsection 158(2) of the Act in conjunction with subsections 128(1) and 9(1) of the Act.

Relevant Statutory Provisions

13. Section 9 of the Act provides:

> **9.** (1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.
>
> (2) Where, upon an application for certification, the Board is satisfied that any dispute as to the composition of the bargaining unit cannot affect the trade union's right to certification, the Board may certify the trade union as the bargaining agent pending the final resolution of the composition of the bargaining unit.
>
> (3) Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to the skills or craft, and the Board may include in the unit persons who according to established trade union practice are commonly

associated in their work and bargaining with the group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

(4) A bargaining unit consisting solely of professional engineers shall be deemed by the Board to be a unit of employees appropriate for collective bargaining, but the Board may include professional engineers in a bargaining unit with other employees if the Board is satisfied that a majority of the professional engineers wish to be included in the bargaining unit.

(5) A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of the dependent contractors wish to be included in the bargaining unit.

14. Subsection 128(1) of the Act provides:

128. (1) Where a trade union applies for certification as bargaining agent of the employees of an employer, the Board shall determine the unit of employees that is appropriate for collective bargaining by reference to a geographic area and it shall not confine the unit to a particular project.

15. Subsections 158(1) and (2) of the Act provides:

158. (1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126 shall be brought by either,

(a) an employee bargaining agency; or

(b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (2) or by voluntary recognition.

(2) Despite subsection 128(1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.

16. Subsection 135 of the Act provides:

> **135.** (1) Upon an application for accreditation, the Board shall determine the unit of employers that is appropriate for collective bargaining in a particular geographic area and sector, but the Board need not confine the unit to one geographic area or sector but may, if it considers it advisable, combine areas or sectors or both or parts thereof.
>
> (2) The unit of employers shall comprise all employers as defined in section 126 in the geographic area and sector determined by the Board to be appropriate.

17. Subsections 160(1) and 128.1(24)(b) of the Act provide for the issuing of two certificates in ICI applications as follows:

> **160.** (1) Subject to section 11.1, the Board shall certify the trade unions on whose behalf an application for certification is brought as the bargaining agent of the employees in the bargaining unit if more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade unions. The Board shall issue one certificate that is confined to the industrial, commercial and institutional sector and another certificate in relation to all other sectors in the appropriate geographic area or areas.
>
> ...
>
> **128.1**(24) If an election under this section is made in relation to an application for certification that relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126,
>
> ...
>
> (b) if the Board certifies the trade unions on whose behalf the application for certification was brought as the bargaining agent of the employees in the bargaining unit under clause (13)(a), it shall issue one certificate that is confined to the industrial, commercial and institutional sector and another certificate in relation to all other sectors in the appropriate geographic area or areas;
>
> ...

Appropriateness of Bargaining Units under subsection 158(2) of the Act

18. The pivotal problem with HHL's argument lies in its submission that subsections 128(1) and 158(2) of the Act make only one bargaining unit appropriate for an application for certification under subsection 158(2) of the Act, i.e. encompassing only one geographic area. This is problematic because it treats the geographic areas into which the Board has divided most of the province as if "geographic area" were a defined term in the Act or the regulations. Not only is this concept not defined, it is clear that the references to "geographic area" in subsection 158(2) and other sections of the Act merely provide an accessible method to circumscribe the physical scope within which workers engaged in a construction project must be situated on the application filing date to be

included within the applicant's bargaining rights. When the Board deals with applications for construction projects in areas outside the boundaries of the enumerated Board Areas (known as white areas) the Board is free to develop descriptions that only in part use the proximate geographic areas as boundaries.

19. It is noteworthy that subsection 128(1) of the Act specifies that a bargaining unit be described "with reference to a geographic area" not by geographic area. This leaves open not only the description of bargaining units for workers in the so-called white areas, but it also allows the exercise of the Board's discretion to describe bargaining units in terms that are broader than just one geographic area. HHL's argument concedes that subsection 128(1) is not eliminated by the initiating verbiage in subsection 158(2) "despite subsection 128(1)". The two subsections must be read together.

20. There can be no question that subsection 158(2) of the Act unequivocally "deems" a unit of employees engaged in non-ICI work in "a geographic area" to be appropriate for collective bargaining. The purpose of this is to eliminate any debate about what ought to be minimal coverage encompassed within a certificate not to foreclose the Board making a determination that a bargaining unit description that goes beyond one geographic area is appropriate. In different terms, the same result is accomplished in subsection 158(1) and the certificate ultimately issued with respect to non-ICI work under subsection 160(1) can be based upon more than one geographic unit. Nothing in any of these subsections *confines* the Board to finding appropriate only a bargaining unit with one geographic area described if the union applicant asks for more and can show that it has members are at work on projects in geographic areas referenced.

21. Put another way, neither subsections 158(1) or (2) of the Act eliminate the Board's discretion under subsection 128(1) of the Act to determine, in the context of the construction industry, the unit of employees that is appropriate for collective bargaining "by reference to a geographic area". This conclusion makes labour relations sense because there is nothing inherently wrong with employees who are working in the non-ICI sectors for the same employer in a number of geographic areas banding together into a larger bargaining unit than the minimum established by subsections 128(1) and 158(2) of the Act.

22. HHL's reliance on *Newman Bros. Limited, supra*, as an authoritative determination of how the Board should exercise its discretion under subsection 128(1) [then subsection 108(1)] with respect to an application made under subsection 158(2) of the Act also is problematic. The most serious problem is that neither subsections 158(1) or (2) was in the Act at the time. The Board's pronouncements thus must be tempered by the substantially changed circumstances subsection 158(2) of the Act brought when its was introduced into the Act, especially with its introductory words "despite subsection 128(1) of the Act".

23. Another problem is that the statement of the practice of the Board was unnecessary to the conclusion in *Newman Bros. Limited, supra*, that the proposed unit described with reference to two geographic areas was not appropriate because employees were only at work on a project within the boundaries of only one of those geographic areas. *Newman Bros. Limited, supra,* does demonstrate the Board's long standing insistence that the scope of the bargaining unit be described with reference to geographic areas where there are people at work on application date as a means of making sure the scope of certification rights are realistically anchored to workers' wishes. If the line were not drawn

this way, the Board would have no other method to restrain description from encompassing all geographic areas and a province-wide unit.

24. It is not surprising that HHL was unable to cite any decisions of the Board finding that a bargaining unit proposed in an application under subsection 158(2) (or subsection 158(1)) encompassing more than one geographic area could not *per se* be appropriate for collective bargaining or finding that one of two or more geographic areas should not be included in the certificate issued because the separate count of membership evidence with respect to that geographic area did not *independently* warrant certification. Although HHL is somewhat correct in its assertion that the issue of the appropriateness of more than one geographic area forming a bargaining unit in a certification application was not raised by the employers in the cases cited by the applicant, it is equally correct to conclude that these cases show the Board's comfort with the appropriateness of a bargaining unit being described in terms of more than one geographic area. At the very least, these decisions demonstrate that the practice of the Board under subsection 128(1) of the Act has undergone a justifiable change since *Newman Bros. Limited, supra,* and exemplify the exercise of the Board's residual discretion under that subsection to determine appropriate bargaining units with reference to multiple geographic areas.

25. Although subsections 128(1) and 158(2) of the Act provide specific guidance to the Board for its deliberations on the appropriateness of bargaining units in non-ICI certification applications, subsection 9(1) of the Act continues to require that all units found appropriate must have more than one member. This is an overarching proviso that is a statement of the obvious since the main purpose of the Act is to "facilitate *collective* bargaining" and a "collective" is usually at least two people.

The impact of the Board's requirement of workers to be at work in each geographic area included in the applications under subsections 158(1) or (2)

26. HHL relies heavily upon the following excerpt from paragraph 8 in the initial decision in *Primeline Plumbing Limited, supra*:

> "So long as there are employees working in those geographic areas on the date of application, then a bargaining unit described in terms of those areas is an appropriate bargaining unit."

to support the conclusion that geographic areas always remain discrete bargaining units, at least for the purposes of subsection 9(1) of the Act. HHL's argument misconstrues the rationale for this requirement in the context of applications under both subsections 158(1) and 158(2) of the Act. As indicated earlier, the legitimate concern of the Board is that an applicant obtains representation rights for an area of the province where work was being performed on the application filing date. Beyond this rationale, the requirement has no impact on the interpretation of either subsection 158(1) or (2) of the Act.

27. The Board's decision in *Primeline Plumbing Limited, supra,* dealing with the employer's request for reconsideration that raised for the first time the assertion that the Board misapplied section 158(2) of the Act by allowing the applicant's inclusion of two geographic areas in its bargaining unit. At paragraph 8 the Board said that:

> "Section 158(2) makes reference to a "geographic area". The responding party submits that must mean only one geographic area and refers

> to section 158(1) which provides that a union making an application in relation to the ICI sector must also include "at least one appropriate geographic area". In our view, the reference to "a geographic area" does not necessarily limit a trade union to only one geographic area when seeking certification. Section 158(2) must be read with section 158(1). Section 158(2) allows affiliated bargaining agents who would otherwise be required to seek certification in relation to a province-wide ICI bargaining unit together with "at least one appropriate geographic area" to seek certification with respect to a bargaining unit that does not include the ICI sector. It makes little sense to interpret the Act as precluding a union that could seek and obtain bargaining rights in several geographic areas outside of the ICI sector when making an application in relation to the ICI sector from doing so when seeking bargaining rights outside of the ICI sector if its application does not relate to the ICI sector."

28. The symmetry between subsections 158(1) and 158(2) is also operative in the issuance of one certificate to an applicant union with one bargaining unit description in terms of the known and accepted boundaries of the geographic areas invented the Board, and if necessary including the "white areas" left out of that system. That description becomes the legal scope of the applicant's bargaining rights until such time as a collective agreement for the non-ICI work is forged. Since displacement applications are tied primarily to the units agreed in collective agreements, decisions from that part of the Board's activities are best read in that context and do not detract from the reasoning set out above.

Use of the singular "geographic area" in subsection 158(2) and in the plural in subsection 160(1)/128.1(24)(b)

29. Subsections 160(1) and 128.1(24)(b) of the Act, read in conjunction with subsection 158(1) of the Act, rebut HHL's argument. Subsection 158(1) of the Act does not refer to geographic areas in the plural but subsections 160(1) and 128.1(24)(b) of the Act plainly indicate the issuing of a second certificate for the non-ICI sector for a bargaining unit including more than one geographic area. There is no comparable section with respect to the certificate issued in an application for certification pursuant to subsection 158(2) of the Act, i.e. relating to the non-ICI sector alone, however, the process of permitting the inclusion of more than one geographic area should for sound labour relations reasons be the same for both types of applications. For the reasons stated in the Board's reconsideration decision in *Primeline Plumbing, supra,* the contemplation of geographic "areas" being included in the bargaining unit certified through the second certificate relating to non-ICI work removes any doubt that bargaining units of this sort can be appropriate.

Subsection 9(1) of the Act

30. Since the subject bargaining unit, described in terms of more than one geographic area, can be appropriate under subsection 158(2) of the Act, the minimum constituency requirements of subsection 9(1) must be applied to that unit, not the individual geographic areas. To break apart this unit, which we have determined as a totality to be appropriate under subsections 128(1) and 158(2) of the Act, for the purposes of applying this provision, not only achieves no labour relations purpose but would defeat the legitimate interests of these two individuals' right to exercise their choice to be represented by the applicant in their employment relationship with HHL.

Conclusion

31. For all these reasons this application will not be dismissed.

32. The only outstanding issue is the applicant's assertion that the responding parties constitute one employer for the purposes of the Act or in the alternative that there has been a sale of business or part thereof under section 69 of the Act. The applicant indicates that it will file an application under subsection 1(4) and section 69 of the Act "should it be necessary to do so after reviewing the responding party's [sic] response". Until the issue with respect to the identity of employer(s) of the workers the applicant seeks to represent is resolved, the Board can make neither a final determination of the appropriate bargaining unit nor a determination pursuant to subsection 128.1(4) of the Act. This application is therefore referred to the Manager of Field Services to conduct a Regional Certification Meeting.

33. This panel is not seized.

3322-03-R; 2118-04-R Independent Electricity Market Operator, Applicant v. Canadian Union of Skilled Workers, Responding Party; Independent Electricity Market Operator, Applicant v. Labourers' International Union of North America; Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1059, Responding Parties

Bargaining Rights – Constitutional Law – Construction Industry – Employer – Termination – The Independent Electricity Market Operator, currently called the Independent Electricity System Operator (IESO), sought a declaration that it was a non-construction employer because it was a consumer of construction services and not a vendor of same – If such a declaration were to issue from the Board, the unions reserved the right to challenge the constitutionality of the non-construction employer provisions – The IESO has two main functions: (1) to ensure the reliable operation of the electrical power system in Ontario; and (2) to operate the wholesale electricity market in Ontario (including a price-setting function) – The IESO is neither a generator nor a transmitter of electricity; it ensures the reliability of the electrical power system in the province through market rules and operating agreements with various market participants – There was no dispute that the IESO engages contractors from time to time to perform construction work for its own benefit – The Board found that market fees paid to the IESO by market participants are not the kind of compensation contemplated by the definition of a non-construction employer – The Board found the situation in the present case to be similar to government funding provided to a school board that the board uses to pay for construction activity: the funds are not paid in order for construction work to be performed for the benefit of the giver of the funds – Non-construction employer declaration granted – Matter referred to Registrar to schedule constitutional argument

BEFORE: *Caroline Rowan*, Vice-Chair.

APPEARANCES: *L. A. Richmond* and *H. Bartlett* for the Labourers' International Union of North America, Labourers' International Union of North America, Ontario Provincial District Council and

Labourers' International Union of North America, Local 1059 and *L. A. Richmond* and *T. MacLean* for the Canadian Union of Skilled Workers; *Richard J. Charney, Daniel R. McDonald, Norman Thomas, Roy Stewart, Ted Leonard, John Visca* and *Horst Schneider* for Independent Electricity Market Operator.

DECISION OF THE BOARD; March 3, 2008

1. Board File Nos. 3322-03-R and 2118-04-R are both applications filed pursuant to section 127.2 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act").

2. The Independent Electricity Market Operator, which is now referred to as the Independent Electricity System Operator (hereinafter the "IESO") seeks a declaration that it is a "non-construction employer" within the meaning of the Act and consequently that the responding parties, Canadian Union of Skilled Workers and Labourers' International Union of North America, Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1059, ("the unions") no longer represent employees of the IESO employed in the construction industry.

3. The definition of a non-construction employer set out under section 126 of the Act is as follows:

> An employer who does no work in the construction industry for which the employer expects compensation from an unrelated person.

4. Given the wording of the definition, if the IESO performs *any* such work it does not fall within the definition and the application will be dismissed. While the IESO does not dispute that it performs construction work and/or causes construction work to be performed from time to time, it contends that it does not meet the definition, since it is a consumer of construction services, rather than a vendor of construction services. In this respect, the IESO notes that it does not expect compensation for any of its construction activities from an unrelated person or from any person for that matter.

5. The parties agree that, in the event that the Board finds that the IESO does meet the definition of non-construction employer, only a declaration to that effect should issue at this stage in view of the Charter challenge raised by the responding parties. The responding parties challenge the constitutionality of the non-construction employer provisions of the Act in light of the recent decision of the Supreme Court of Canada in *Health Sciences and Support – Facilities Subsector Bargaining Assn. v. British Columbia,* [2007] S.C.J. No. 27. The parties agree to address the constitutional issue at a hearing to be held only if the Board finds that the IESO meets the definition of a non-construction employer. They also agree that any party is permitted to call evidence on the Charter issue at that hearing.

(i) Background

6. The IESO (previously called the Independent Electricity Market Operator ("IMO")) was established by the *Electricity Act, 1998,* S.O. 1998, c. 15, Sched. A (the "EA") on April 1, 1999 as a not-for-profit, non-share capital corporation. It was created in the context of a larger restructuring of the electricity market in Ontario, under which the former Ontario Hydro, a monopoly generator, transmitter and distributor of electricity, was reorganized into a number of different entities under a

plan designed to introduce competition into Ontario's electricity system. For ease of reference, the applicant will generally be referred to simply as the IESO even though it may have been known as the IMO at the relevant time.

7. The "de-merger" of former Ontario Hydro as it existed prior to April 1, 1999 resulted in the creation of the entities now known as the following: Hydro One Inc. ("Hydro One"), Ontario Power Generation Inc. ("OPG"), the Ontario Electricity Financial Corporation ("OEFC"), the Electrical Safety Authority ("ESA") and the IESO. Generally speaki ıg, Hydro One acquired the majority of the transmission role of the former Ontario Hydro as well as any distribution role it had. OPG acquired its generation role. The ESA took on its safety function and the OEFC holds the debt of the former Ontario Hydro.

8. The creation and function of the IESO has already been set out in *Ontario Electricity Financial Corporation and Independent Electricity System Operator*, [2006] OLRB Rep. July/August 594 (July 31, 2006), involving an earlier proceeding between these parties, and need not be repeated in detail here. Some background is, however, necessary to understand the context in which the construction activities of the IESO are performed. At the time that the IMO was created in 1999 up until the passage of the *Electricity Restructuring Act, 2004*, S.O. 2004, c. 23 ("Bill 100") effective January 1, 2005, under which the IMO was renamed the IESO, the objects of the IMO were as set out at section 5(1) of the EA as follows:

> 5. (1) The objects of the IMO are,
>
> (a) to exercise and perform the powers and duties assigned to the IMO under this Act, the market rules and its licence;
>
> (b) to enter into agreement with transmitters giving the IMO authority to direct the operations of their transmission systems;
>
> (c) to direct the operations and maintain the reliability of the IMO-controlled grid to promote the purposes of the Act;
>
> (d) to establish and create the IMO-administered markets to promote the purposes of this Act;
>
> (e) to collect and provide to the public information relating to the current and future electricity needs of Ontario and the capacity of the integrated power system to meet those needs;
>
> (f) to participate in the development by any standards authority of standards and criteria relating to the reliability of transmission systems;
>
> (g) to work with the responsible authorities outside Ontario to co-ordinate the IMO's activities with their activities.

Pursuant to the amendments made under Bill 100, the last four objects (i.e. (d) to (g)) of the organization now known as the IESO were revised to read as follows:

> (d) to participate in the development by any standards authority of standards and criteria relating to the reliability of transmission systems;

(e) to work with the responsible authorities outside Ontario to co-ordinate the IESO's activities with their activities;

(f) to collect and provide to the OPA and the public information relating to the current and short-term electricity needs of Ontario and the adequacy and reliability of the integrated power system to meet those needs; and

(g) to operate the IESO-administered markets to promote the purposes of this Act.

Three additional objects of the IESO were subsequently added by regulation and became effective sometime in the Fall of 2006. One of these new objects was to clarify the IESO's role as a reliability standards-making authority and the other two new objects relate to the IESO's role in managing the smart metering initiative.

9. Although there are now ten objects of the IESO, the evidence indicates that the two primary functions of the IESO are: 1) to ensure the reliable operation of the electrical power system in Ontario; and 2) to operate the wholesale electricity market in Ontario, which involves a price setting function. The IESO is neither a generator, nor a transmitter of electricity. It ensures that reliability standards are adhered to by the Ontario market participants so that system reliability is maintained when generators inject electricity into the grid and transmitters convey electricity along the grid. Market participants are defined in the EA to mean "a person who is authorized by the market rules to participate in the [IESO]-administered markets or to cause or permit electricity to be conveyed into, through or out of the [IESO]-controlled grid". Fulfilling the IESO's reliability function relates to the manner in which the system operates. Reliability has two components: 1. security, which refers to the ability of the system to withstand a sudden loss of a component; and 2. adequacy, which involves ensuring that there is sufficient supply to meet demand at all times.

10. The IESO carries out its responsibility of ensuring the reliability of the electrical power system in Ontario by means of market rules and operating agreements with various market participants. The IESO has the ability to make rules related to governing the IESO-controlled grid and to establish and govern markets related to electricity and ancillary services. These market rules may include rules allowing the IESO to give direction to market participants to take action specified in the direction for the purpose of maintaining the reliability of the electrical service. The operating agreements and the market rules are necessary given that, following the de-merger of the former Ontario Hydro, the entity charged with responsibility for ensuring reliability is no longer part of the same organization that owns the assets, such as the grid, which is now owned by Hydro One.

11. The IESO oversees the operation of the grid for reliability purposes by sending directions to market participants. There is therefore a relationship amongst market participants contemplated under the Act, under which the IESO can give directions to other market participants, including Hydro One and OPG. For example, the IESO can give directions to market participants to increase or decrease electrical outputs.

12. The IESO charges fees to market participants to recover its costs of operation. Mr. Leonard, the IESO's director of finance, testified that approximately ninety-five percent of the IESO's revenue comes from usage fees. Market participants receive settlement statements on a daily basis and are invoiced on a monthly basis. The different charge types appear on their statement. According to Mr. Leonard, none of the charges relate to the provision of construction services, since the IESO does not undertake construction services. The fees are charged to the various market

participants based on the amount of electricity they respectively consume from the grid and therefore vary depending on electricity use. As such, the OPG, which generates more electricity than it draws from the system, does not generally pay fees to the IESO.

13. The IESO also charges a $1,000 application fee to those entities applying to become market participants and charges a cost recovery fee to conduct system impact assessments. As discussed in further detail below, these assessments are done when a market participant applies to connect a new transmission line or a new source of generation to the grid. The IESO also charges a cost recovery fee for training it provides to market participants.

14. Where revenues received by the IESO exceed its expenses, the IESO rebates to market participants any surplus in excess of $5 million dollars. These rebates are based on how many megawatt hours each market participant consumed in the prior year.

(ii) Alleged Construction Activities engaged in by the IESO

The Clarkson Control Centre

15. The IESO's principal operational facility is referred to as the Clarkson Control Centre where many of its management and non-management employees work overseeing the operations of the electricity grid. The evidence indicates that the IESO requires construction work associated with office renovations/rearrangements to be performed from time to time at the Clarkson Control Centre. This type of work has been done by contractors engaged by the IESO and paid for by the IESO.

16. The IESO caused a substantial amount of construction work to be performed at the Clarkson Control Centre in the period between October 2001 and August 2002. This work was done in connection with the expansion of that facility referred to as the "West Wing expansion". The IESO issued a request for proposal for the design, engineering and expansion of the office facility. Giffels Associates Limited ("Giffels") was the successful bidder and undertook all of the construction management responsibilities including tendering work to various subtrades. The IESO did not use any of its own employees to do the construction work associated with the West Wing expansion.

17. Mr. Schneider, the IESO's facilities manager, testified regarding re-roofing work that was done at the Clarkson Control Centre between November 2002 and May 2003 and again between June 2004 and December 2004. The IESO engaged Giffels to provide the request for proposal for the re-roofing work. The successful bidder in both cases was Bothwell-Accurate, which company used its own employees to perform the re-roofing work. The IESO paid for this construction work to be performed at its facility. It received no payment from a third party specifically for this work.

18. Mr. Schneider also testified about re-lamping work performed at the Clarkson Control Centre in 2003 and 2004. That re-lamping work involved removing fluorescent tubes and replacing them with new ones. The IESO contracted this re-lamping work to Osram Sylvania Ltd., which company in turn subcontracted the work to Kennedy Electric. The work was carried out by employees of Kennedy Electric and the IESO paid for this work to be done.

19. The re-lamping project included, but was not limited to, the space at the Clarkson Control Centre occupied by HEPCOE Credit Union Limited ("HEPCOE"). HEPCOE is a credit union that occupied a room of between 600 and 800 square feet located near the entrance to the Clarkson

Control Centre. HEPCOE occupied this space since prior to 1999 when the Clarkson Control Centre was operated by Ontario Hydro. The updated lighting work benefited both the IESO and its employees who entered the HEPCOE space and also benefited HEPCOE's employees and its customers.

20. HEPCOE was not charged any rent for the space it occupied at the Clarkson Control Centre and was not charged anything for the re-lamping work done in that space. Although the terms of the Licence Agreement between the IESO and HEPCOE obligated the IESO to make any repairs at its own cost, no repairs were ever effected by the IESO at the HEPCOE space. HEPCOE maintained and repaired its own chattels. In 2003 or 2004, HEPCOE, with the IESO's permission, had a doorway installed in the security vestibule of the Clarkson Control Centre in order to facilitate access to HEPCOE's office for its customers. HEPCOE paid its private contractor to do that installation. HEPCOE vacated the space at the Clarkson Control Centre in 2006.

Skymark Back-up Centre

21. From the IESO's inception in 1999 until in or about April 2007, it used a back-up centre located in a leased facility in Mississauga referred to as the Skymark back-up centre ("Skymark"). The back-up operating centre provides for disaster recovery and emergency preparedness in the event of a catastrophic failure of the principal control centre. In November 1999, the IESO took over some additional space on the second floor of that same facility in Mississauga. At that time, the IESO did some renovation to the space with the landlord's consent. The renovation work was done by Venture Construction and was paid for by the IESO.

22. The second floor space was later abandoned by the IESO in or about 2004. According to Mr. Schneider, the IESO was required by the terms of its lease to return that space to a "broom swept condition", which it did using its own forces represented by the Power Workers' Union ("PWU employees"). Mr. Schneider estimated that the amount of work involved was between 20 and 40 hours. The IESO did not charge the landlord of the Skymark facility or anyone else for this work. The IESO also did not receive any indirect remuneration, such as a rent rebate, for doing this work.

23. The Skymark facility was de-commissioned in or around April 30, 2007. The IESO's lease at that location expired on June 30, 2007. The IESO had a similar obligation to return the premises to a broom swept condition, which work is being done by PWU employees. The IESO is not charging anyone for this work.

Sungard Back-up Facility

24. The IESO's current back-up centre is located in the City of Mississauga and is operated by Sungard, an organization that specializes in disaster recovery facilities. Unlike the Skymark facility, the Sungard facility is not a leased premise. Instead, the IESO has a contractual agreement with Sungard for the provision of services. The premises in question are owned by Sungard and the IESO pays Sungard a fee for the back-up services it provides. Sungard generally provides the telecommunication infrastructure to operate the back up centre. According to Mr. Schneider, the IESO has not performed any construction work at the Sungard facility. The IESO instead forwarded its requirements to Sungard and Sungard provided the necessary facilities and constructed the premises including the walls, the floors, the power connections, and the necessary telecommunications. While Sungard made certain alterations to its facility to meet the IESO's needs,

the IESO received no credit for the improvements made to Sungard's facility. Mr. Visca, the IESO's manager of technology support, testified that the IESO has made no alterations to Sungard's facility since it is not permitted to do so. The IESO did however install some computers there, but did not charge Sungard for this work.

Minto Plaza

25. The IESO's corporate head office is located in a leased space at the Minto Plaza in downtown Toronto. The premises are managed by Minto, which has its own maintenance department that does small repairs and maintenance.

26. There have been some renovations done to the premises leased by the IESO at the Minto Plaza during the time that the IESO has occupied them. From 2001 to early 2003, there was a renovation at the Minto Plaza to provide additional office space for the IESO's head office. The IESO approached Minto Commercial with its requirements and Minto Commercial engaged its architect, Gio-Tan, which company issued a request for proposal for the work. Van Dyke Construction was the successful construction contractor. Minto Commercial paid the invoices associated with this work and was not compensated by the IESO for it other than through its continued lease arrangement with the IESO. There is no evidence to suggest that the IESO received any remuneration from Minto either directly or in the form of a reduction to its rent or otherwise for the modifications made to the leased premises at the Minto Plaza.

Metering and Other Monitoring Devices

27. The IESO, through the market rules, requires market participants to have meters in place that meet certain specifications and therefore requires market participants to have them installed if they are not already in place. It does so in order to carry out its function of monitoring the grid and administering the markets. Metering service providers recognized by the IESO do the installation. They are retained by the market participant to do both installation and repair. The meters themselves are owned by the market participant. Hydro One acts as its own meter service provider. The IESO is not itself a meter service provider and it does not receive a fee or other remuneration when work is performed by meter service providers.

28. Mr. Visca, the manager of technology support for the IESO, testified regarding the other technical units that the IESO requires market participants to install pursuant to the market rules. The IESO requires these information technology devices to be in place in order to receive data regarding electricity flow. These units include what are referred to as remote technology units or RTUs, frame relay acquisition devices or FRADS, and telecommunication connections.

29. According to Mr. Visca, RTUs are the size of a desktop computer. They are a chattel that can be placed on a desk or on a rack. There are a number of manufacturers of RTUs. The market rules require that market participants have these units installed in order to participate in the IESO-controlled grid. The RTUs are owned by the market participant and are the responsibility of the market participant. They are placed by the market participant in a location on the market participant's property. Although a number of market participants had RTUs prior to market opening, these RTUs were decommissioned primarily because they were reaching the end of their operational lives. The removal of these decommissioned RTUs was carried out by OPG and Hydro One back in 2003. The IESO paid OPG and Hydro One to have them removed.

30. Mr. Visca's evidence indicates that FRADs are also chattels that are the size of a desktop computer. They are purchased by the IESO from a company called Rycomm and shipped to the market participant once the IESO knows that the RTU is functioning at the market participant's work site. FRADs are then connected to RTUs at the market participant's work site and are used to convert and route data over a private frame cloud or telecommunications cloud. The physical installation work on the market participant's property is done by Rycomm or another telecommunication provider and is paid for by the IESO. The market participant does not pay the IESO for the installation of the FRAD.

31. FRADS and cybectec boxes, which are devices used to concentrate 16 FRAD connections into a single serial connection, are also installed at the IESO property by PWU employees. These devices are then connected to remote terminal gateways, which are devices or chattels used to store the data acquired from the market participant. These devices are pre-configured and are also installed by PWU employees by placing them on a computer rack. There is also a telecommunication connection that Allstream provides to read the data, and for which the IESO pays a monthly service fee to Allstream. The communication allows the IESO to receive data from market participants.

Interconnection Agreements

32. Interconnection agreements govern the relationship between the IESO and its neighbours, who are connected via interconnection tie lines. The agreements allow for coordinated operation of the transmission systems in the relevant jurisdictions and for the maintenance of the reliability of the interconnection. The IESO has entered into interconnection agreements with a number of other entities in different jurisdictions, such as with Hydro-Québec Transénergie ("Hydro-Québec"). One of the elements of these interconnection agreements is the requirement that interconnection meters be installed. Interconnection meters are used to measure the flow of electricity between various jurisdictions, such as between Ontario and Quebec.

33. Under the terms of the IESO's interconnection agreement with Hydro-Québec, there is an obligation to install metering equipment as required to provide both parties with electric power quantities data. Under the terms of this agreement, the cost allocation between these two parties for the provision of metering equipment will be determined by the interconnection committee. The evidence indicates that each party is, in fact, responsible for maintaining the metering equipment on their respective side of the border, being the metering equipment that they respectively own, lease or contract for use.

34. In Ontario, the tie lines with its neighbours are owned by Hydro One. The IESO has entered into an interconnection revenue meter service agreement with Hydro One, under which Hydro One is responsible for installing, repairing and maintaining interconnection meters located on Hydro One property. That work is done by Hydro One for the IESO since the IESO requires the data provided by the meters. Of the seven tie lines between Quebec and Ontario, Hydro-Québec looks after metering on the four located in Quebec and Hydro One looks after the remaining three located in Ontario. Neither the IESO nor Hydro-Québec pays the other for this work. Both parties require the data provided by the interconnection meters. Although the agreement between the IESO and Hydro-Québec contemplates that any dispute concerning who pays for meter installation can go to arbitration, the IESO has never gone to arbitration with Hydro-Québec regarding this issue.

35. In 2003, the IESO contracted with Hydro One to do interconnection meter installation work at Chats Falls, which is located on the Quebec border. This project was referred to as the Chats Falls Interconnection Metering project ("the Project"). One of the reasons for the Project related to OPG's decision to modernize the Chats Falls Generating Station by de-staffing it. As a result, OPG staff would no longer be available to collect and fax the tie line meter readings to the IESO as it had done since market opening. The IESO paid Hydro One to do the necessary work in connection with the Project. Although the interconnection metering also provided data required by Hydro-Québec, Hydro-Québec did not provide any payment for the work done for the Project.

36. In 2004, Hydro-Québec started doing metering servicing on behalf of the IESO located at the Otto Holden Generating Station on the Ottawa River because it was more cost effective from Hydro-Québec to do it. According to Mr. Tench, the IESO's director of planning and assessments, this was an arrangement that was beneficial for all parties and Hydro-Québec did not charge the IESO for this work. Modernization of that metering similar to the work done at Chats Falls is in the planning stages.

System Impact Assessments and Participation at Ontario Energy Board ("OEB") Proceedings

37. The IESO prepares system impact assessments for market participants in connection with a proponent's proposal to add a connection to the grid. A proponent of a new transmission facility cannot construct a project without obtaining leave of the OEB. The proponent must therefore file a leave to construct application with the OEB. The IESO is called upon to perform a system impact assessment to assess the reliability and market impacts of proposed new or modified connection to the IESO-controlled grid and measures to mitigate any identified adverse impacts. These system impact assessments are required by the market rules and are submitted to the OEB with leave to construct applications. The OEB often makes approval of an application conditional on the proponent implementing the IESO's recommendations in its system impact assessment.

38. IESO employees, who are typically engineers represented by the Society of Energy Professionals, perform the system impact assessments or review system impact assessments performed by third parties. Generally speaking, the IESO identifies in these assessments the impact, either positive or adverse, of the project on system reliability. The IESO is paid by the proponent to carry out these system impact assessments. The IESO also intervenes in leave to construct applications filed by a proponent at the OEB and makes its representatives available to the OEB for questioning. The IESO is not paid by anyone to do these interventions.

39. The IESO also performs technical analyses for the Ontario Power Authority ("OPA"), under which it provides an assessment of the operability or potential impact of any plans the OPA may have for future projects ("OPA Assessments"). The IESO charges the OPA for these OPA Assessments in order to recover its costs. According to Mr. Tench, the IESO's director of planning and assessments, the IESO does not initiate projects. Instead, the OPA currently issues requests for proposals ("RFPs") and is the entity responsible for procuring generation to meet the province's needs. The OPA came into existence on January 1, 2005 with the passage of Bill 100 and has three primary functions: 1. to contract for new generation; 2. to develop what is referred to as the integrated power system plan, which is a twenty year plan that assesses the generation and transmission needs of the province and which is submitted to the OEB for approval; 3. conservation and demand management. The IESO does not have this procurement function.

Outline of the Positions of the Parties

40. The unions emphasize that the IESO is a unique statutory creature and is unlike any of the entities considered in the earlier decisions of the Board addressing the non-construction employer provisions. According to the unions, the IESO is engaged in construction activities from time to time (albeit not to a significant extent) and therefore meets the definition of "employer" under section 126 of the Act.

41. The unions contend that the definition of "non-construction employer" should be read very restrictively having regard to a number of principles of statutory interpretation. The unions rely on the decision in *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27 for the proposition that it is necessary to look at the context of the provision when interpreting a section. The unions note that the non-construction employer provisions are contained in a statute whose purposes include facilitating collective bargaining. Since the non-construction employer provisions do precisely the opposite in that they eviscerate the right to collective bargaining, it is essential, the unions submit, to interpret the legislation restrictively.

42. The unions also refer to the Supreme Court of Canada decision in *Health Sciences and Support – Facilities Subsector Bargaining Assn. v. British Columbia,* cited above, for the proposition that there is a constitutional right to collective bargaining now recognized by the Supreme Court of Canada and that substantial interference with collective bargaining breaches the freedom of association guarantee of the Charter. While the unions contend that they are not, at this stage, arguing the Charter case, they suggest that in interpreting the non-construction employer provisions of the Act, the Board's duty is to seek an interpretation that supports, rather than runs counter to, a Charter value. The unions refer to the following cases in support of the position that where two alternate constructions of a statute are possible, the one that is consistent with Charter values is to be preferred: *Allsco Building Products Ltd. v. U.F.C.W., Local 1288P,* 176 D.L.R. (4th) 647 (S.C.C.); *Slaight Communications Inc. v. Davidson* [1989] 1 S.C.R. 1038; *Hills v. Canada (Attorney-General),* 48 D.L.R. (4th) 193 (S.C.C.).

43. The unions contend that the non-construction employer provisions substantially interfere with collective bargaining in that they eliminate the right to collective bargaining altogether. According to the unions, they are brutal provisions, which do not involve tinkering or adjusting what can be bargained or how bargaining takes place. The unions argue that they end the collective bargaining process altogether. For these reasons, the unions submit that the provisions should be construed very restrictively such that only an employer who has nothing to do with the construction industry, except for its own purposes and exclusively for its own purposes, can fall within this section.

44. The unions note that, under the terms of the EA, the IESO is operating the market, which is referred to as the IESO-administered market, and that the IESO makes the rules governing the market. The IESO maintains the reliability of the IESO-controlled electricity grid and it derives fees to recover the costs of all of its operations, including costs relating to construction activities. These fees are paid by approximately three hundred market participants, who are required to pay IESO's fees in order to participate in the market.

45. The unions contend that the IESO facilitates construction in various ways and that the main way that it does so relates to the interconnection meter installation work at Chats Falls and to

the interconnection agreement with Hydro-Québec and the work at the Otto Holden generating station. The other main way in which the unions contend that the IESO facilitates construction relates to the system impact assessments that it does. The unions note that the IESO is paid the cost of doing those assessments directly by the proponent of the construction project under review. According to the unions, the statutory language does not require that the applicant actually do the construction work itself, or perform construction work as part of its own business. It relies on the Board's decision in *Hudson's Bay Company*, [2002] OLRB Rep. May/June 398 (May 28, 2002) for the proposition that it is sufficient that the entity in question "facilitate" construction and that the entity will only meet the definition of a "non-construction employer" if it does no work in the construction industry at large for which it expects compensation from an unrelated person.

46. The unions further submit that the IESO does not meet this definition, since it receives compensation from unrelated persons in the form of fees and direct payments for the system impact assessments it does. According to the unions, the IESO also receives non-monetary compensation in respect of the installation and repair of meters between the border of Ontario and Québec from Hydro-Québec under the interconnection agreement. The unions argue that the agreement reached to the effect that each will install and repair meters on their respective side of the border constitutes a trade, which is a form of compensation.

47. The unions also contend that compensation in the form of fees is used by the IESO to fund all of its activities, including the re-lamping work done at the Clarkson Control Centre, moving the back up centre, participating as an intervenor in applications to construct before the OEB, ensuring that the Chats Falls metering provides it with the correct data. According to the unions, it is irrelevant that the meters are owned by Hydro One, since the IESO dictates that the meters are in place and the IESO requires the accurate data they provide. The unions point out that when it requires market participants to engage in construction activities, the IESO is expending effort in the construction industry, not in its own business, but in the business of the market participants.

48. The unions also suggest that the IESO received "compensation" from HEPCOE for the re-lamping work done at the premises occupied by HEPCOE at the Clarkson Control Centre. Even though HEPCOE did not pay the IESO for this work, "compensation" for it took the form of the mutual advantage of having HEPCOE's office at the Clarkson Control Centre. According to the unions, it was a convenience for the IESO's employees to have a credit union in its building and this was the reason the IESO permitted it to stay there for no fee. The unions argue that the re-lamping work done by the IESO was an advantage to HEPCOE, an unrelated person, and the compensation the IESO received was the same it otherwise had, which was having a credit union in its building. The unions submit that convenience is a form of compensation.

49. The unions similarly argue that it was a mutual advantage to the IESO and to Hydro-Québec to have interconnection meters installed and functioning properly along the Ontario and Quebec border. The arrangement they reached is that the IESO pays for fixing three meters on its side of the border and Hydro-Québec pays for fixing four meters. However, in the event that there is a dispute between them about costs, the issue will go to arbitration to decide the compensation each gets for the obligation and work done by the other on the interconnection line. As such, the unions argue that the IESO is being compensated in kind for the construction work it does through its contractor, Hydro One, and the fact that money does not change hands is irrelevant. This *quid pro quo* is further for the benefit of both parties since both require accurate data. The unions note that this

episodic and sporadic work is the same across all of Ontario's borders and will continue to be required as long as the province continues to have neighbours.

50. The IESO, for its part, argues that the legislative intent in carving out an exception for those meeting the definition of "non-construction employer" is to insulate employers who are not in the business of construction. While the IESO causes construction work to occur, even if it does not perform construction services for a third party, the definition of a construction employer cannot include all those who cause such work to occur. The IESO submits that, if that were the test, every entity in Ontario would be a construction employer and unable to meet the definition of non-construction employer, since everyone needs a wall moved or a fixture installed. The IESO submits that the legislature is instead attempting to strike a balance between a vendor of construction services and a consumer of such services.

51. The IESO argues that the non-construction employer definition set out in section 126 of the Act requires the Board to consider the presence or absence of a number of features. The first involves consideration of whether the employer carries on construction work. The IESO notes that this is something required by most businesses and residents from time to time. The second requirement is the presence or absence of an expectation of compensation, which the IESO says is entirely absent in its case. Thirdly, the compensation must be *for* the construction work such that there is a nexus between the construction work and the compensation. Fourthly, the compensation must flow from a *person* and not from some nebulous concept of a market. Fifthly, the compensation must come from a person *unrelated* to the applicant.

52. While the IESO asserts that the market participants are not related employers within the meaning of section 1(4) of the Act, it contends that they nonetheless have a relationship through the regulatory scheme such that they should not be construed as unrelated within the meaning of section 126 of the Act. The IESO therefore argues that, in the event that the Board finds that all of the other criteria are met, the fees paid to the IESO in the context of a market system regulated by the EA and the market rules mean that these funds do not flow between unrelated persons.

53. The IESO notes that its purposes involve ensuring the reliability of the grid and controlling the market. The evidence indicates that reliability of the grid does not involve the expansion of the grid and has nothing to do with construction or procurement. The IESO contrasts its functions with those of the OPA, which latter entity has the role of encouraging construction and its powers include entering into procurement contracts. Reliability, on the other hand, involves ensuring the technical elements of the system are functioning. Even though the IESO gives direction to market participants through the market rules, that direction and control relates to the flow of electricity for reliability purposes. The IESO submits that it does not direct the development of infrastructure and is not therefore a catalyst for new construction. Instead, the IESO argues that it is the OPA's responsibility to respond to the demand for electricity and to procure construction to meet that demand.

54. The IESO acknowledges that it has required some construction work from time to time and that that construction work has been carried out by contractors. It points out however that the IESO has in all instances paid for the construction work and has never expected compensation from another person for such work. The IESO has required construction work to be done at the Clarkson Control Centre, including in the space occupied by HEPCOE, at Minto, at Skymark and at Sungard and in all cases has been the one to pay for the construction work. According to the IESO, it has not

received any compensation for that work from anyone, including from HEPCOE. The IESO argues that the evidence indicates that the IESO is a consumer of construction services and uses construction employers to carry them out. With respect to the current back-up facility at Sungard, the IESO notes that the evidence indicates that the infrastructure was provided by Sungard, but that the IESO did make certain alterations to the premises to meet its needs, such as having some computers installed. According to the IESO, there is no evidence that Sungard received any credit for improvements made to its facility. The IESO points out that there is also no such evidence relating to construction work done at the Skymark premises during the time the IESO was occupying that space.

55. The IESO disputes that the installation of RTUs, FRADs and telecommunication connections is even construction work. The IESO submits that the evidence with respect to these devices indicates that they are chattels similar to DVD players and home stereos. It argues that the IESO, in any event, receives no compensation for this work. The IESO also disputes the union's contention that the system impact assessments it does facilitate construction. In this regard, it notes that what the IESO is doing when making these assessments is merely ensuring that if additional power is injected into the grid that will not impact on the reliability of the grid. The IESO further disagrees that the assessments should be seen as a benefit to the proponent of the project. According to the IESO, they are a hindrance to the proponent who is unable to obtain the necessary approval for the project without obtaining the assessment that forms part of the approval process. They are a benefit for the IESO in order to execute its statutory duties of ensuring reliability of the grid.

56. The IESO similarly disagrees that its intervention in proceedings before the OEB makes it a construction employer given that its input as well as that of the OPA, of the Ministry of the Environment, and of citizens' groups is required before construction may occur. According to the IESO, using the unions' analysis that "facilitating" construction in some manner is sufficient is misguided, since under that analysis the City of Toronto would also be a construction employer by virtue of its role in issuing construction permits. The IESO submits that an entity such as the IESO, whose role is to monitor the grid and to ensure that certain standards are met, cannot be called a construction employer.

57. With respect to the interconnection metering work required from time to time at the Ontario border, the IESO points out that the only evidence before the Board about any such work having been done relates to work done at Chats Falls back in 2003. The IESO submits that the interconnection agreement between the IESO and Hydro-Québec is not a construction contract, but rather is an agreement to facilitate the flow of electricity between two jurisdictions. The evidence indicates that the agreement between them is that each entity will look after the infrastructure in their own province and that neither will charge the other for doing so. The agreement deals with the obligation to provide metering – not installation or construction. According to the IESO, it contracts with Hydro One to do the metering work *qua* consumer and is neither contracting nor subcontracting that work to Hydro One. Further, the IESO pays Hydro One to do this work, not the other way around.

58. The IESO points out that it is obligated under the regulatory regime to ensure that Hydro-Québec is getting accurate data. The IESO submits that it contracts for some construction activity for its benefit wearing its regulatory or statutory hat. According to the IESO, living up to that obligation benefits the IESO. The IESO notes Mr. Tench's testimony that the IESO did not expect compensation from Hydro-Québec for ensuring that the meters on the Ontario side of the border are functioning. According to the IESO, Hydro-Québec is not ordering construction work to be done. It

simply wants the data. The IESO wants the construction done as a consumer. In its submission, the situation is similar to that involving a homeowner that has a problem with his or her house, which could adversely impact on his or her neighbour's property, such as bricks that could fall. When the homeowner hires a renovator to fix the problem, he or she is doing so as a consumer of construction services for his or her own benefit because of his or her legal obligation. Even though doing so may also benefit his or her neighbour, the homeowner is not being compensated by the neighbour simply because the neighbour may one day do the same with respect to a problem with the neighbour's property.

59. With respect to the IESO's arrangement with Hydro One that Hydro One maintain the interconnection meters in the Province, the IESO takes the position that this work is not construction work. The IESO further submits that, even if the work done by Hydro One in relation to the interconnection meters is construction work, it is carried out by Hydro One for the IESO.

60. Finally, the IESO notes that Mr. Leonard's testimony concerning the sources of the IESO's funding indicates that the IESO does not charge for construction services because the IESO does not undertake construction services (even though it does have construction work done for it). The IESO receives revenue in relation to the system impact assessments it does and is paid to fulfill its objects through a fee system, under which none of the fees relate to the provision of construction services. The fees are levied based on the amount of power taken out of the grid. They are variable by use and have nothing to do with construction. According to the IESO, the requisite nexus between the fees paid and any construction work performed is absent. The IESO also suggests that monies received in the form of fees are not paid by an unrelated person. The monies are paid by a market, not a person, and the market participants cannot, in any event, be construed as "unrelated" to the IESO. The IESO submits that the fees paid to the IESO are paid from related persons, since all of the entities emanate from the same regulatory regime.

61. The IESO contends that the present case is similar to those cases in which the Board has found that a school board meets the definition of non-construction employer. According to the IESO, both school boards and the IESO are created for a statutory purpose, whose function is to serve others and are consumers of construction services. The IESO points out that various school boards have been found to be non-construction employers under the Act, notwithstanding that they receive grants from the Province to cover their operations, including capital construction projects.

Decision

62. In considering whether the IESO meets the definition of "non-construction employer" in the Act, the following provisions are relevant:

> **1.** (1) In this Act,
>
> ...
>
> "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pip lines, tunnels, bridges, canals or other works at the site;
>
> ...

> **126.** (1) In this section and in sections 126.1 to 168,
>
> ...
>
> "employer" means a person other than a non-construction employer who operates a business in the construction industry, and for purposes of an application for accreditation means an employer other than a non-construction employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;
>
> "non-construction" employer means an employer who does no work in the construction industry for which the employer expects compensation from an unrelated person;
>
> **127.2** (1) This section applies with respect to a trade union that represents employees of a non-construction employer employed, or who may be employed, in the construction industry.
>
> (2) On the application of a non-construction employer, the Board shall declare that a trade union no longer represents those employees of the non-construction employer employed in the construction industry.
>
> (3) Upon the Board making a declaration under subsection (2), any collective agreement binding the non-construction employer and the trade union ceases to apply with respect to the non-construction employer in so far as the collective agreement applies to the construction industry.
>
> ...

63. It is well-established that, once a collective bargaining relationship has been established, an "employer" within the meaning of section 126 of the Act can include both vendors of construction services and those who effect construction for their own benefit by engaging contractors. (*The Municipality of Metropolitan Toronto*, [1989] OLRB Rep. Mar. 279). This is because the phrase "person who operates a business in the construction industry" contemplated in the definition describes anyone who effects construction, whether by hiring construction workers or by engaging contractors.

64. In the present case, there is no dispute that the IESO does engage contractors from time to time to perform construction work for its own benefit. For example, the IESO is required to perform construction work associated with office renovations/rearrangements at the Clarkson Control Centre. The IESO has also engaged contractors to do roofing work at the Clarkson Control Centre. While the IESO disputes that some of the other work referred to by the unions, such as the installation of FRADs and RTUs, is construction work, it is not seriously disputed that the IESO effects construction from time to time, albeit not to a significant extent.

65. The question of whether the IESO is an employer within the meaning of section 126 therefore depends on whether it meets the exclusion prescribed in the definition relating to a "non-construction employer". The central issue is whether the IESO has engaged in work in the construction industry for which it expects compensation from an unrelated person. In *Shell Canada Products, a General Partnership of Shell Canada Limited and Shell Canada O.P. Inc. (formerly Shell Canada Limited)*, [2002] OLRB rep. July/August 729 (August 20, 2002), the Board discussed what is required to meet the definition of non-construction employer, as follows:

> 43. ...The definition of "non-construction employer" requires that an applicant demonstrate that it does "no work in the construction industry *for which* the employer expects compensation from an unrelated person". The italicized words must mean, in a grammatical sense, that it is the construction work *for which* the third party is paying. That is, the Third Party directly or indirectly causes the applicant to engage in construction activities, and has undertaken to pay the applicant for doing so.

An employer who performs no work in the construction industry for the benefit of an entity other than itself meets the definition of a non-construction employer. In order for the employer to fall outside of that definition, it must undertake some construction activities "at the behest of, and for the benefit of, an unrelated person and expect to be compensated for such activity." (*Windsor-Essex Catholic District School Board,* [2002] OLRB Rep. September/October 971 (October 17, 2002) at paragraph 13).

66. In the present case, the parties led evidence concerning the construction activities engaged in by the IESO from the time its predecessor, the IMO, was created in 1999. The parties however differ on what weight, if any, the Board should give to evidence of the IESO's construction activities in the period prior to January 1, 2005. The unions argue that the Board should consider all of the IESO's activities throughout the period of the IESO's existence whereas the IESO suggests that a graduated approach is appropriate in the present case. The IESO argues that evidence concerning its activities in the period from its creation in 1999 to May 1, 2002, the date of electricity market opening, is relevant only as background and that little weight should be given to evidence of the IESO's activities in the period from May 1, 2002 to January 1, 2005, the date the OPA came into existence. The parties relied on the following cases in support of their arguments: *Greater Essex County District School Board,* [2003] OLRB Rep. January/February 74 (January 22, 2003); *Greater Essex County District School Board,* [2005] OLRB Rep. March/April 281 (April 20, 2005) and *Alcan Inc.* [2003] O.L.R.D. No. 2497 (July 17, 2003). The Board however finds it unnecessary to determine conclusively which approach should be preferred, since the result is the same regardless of whether the Board considers all of the evidence of the IESO's construction activities or applies lesser significance to the IESO's activities in the early years of its existence.

67. The Board therefore turns to a consideration of whether the IESO meets the definition of non-construction employer on the evidence before it. As noted above, the unions submit that the definition must be interpreted in a very restrictive fashion having regard both to the context of the non-construction employer provisions and to the Board's obligation to seek an interpretation that supports, rather than runs counter to, a Charter value. The Board accepts that the definition is properly interpreted in the context in which it arises. It is an exception to the general rule that permits trade unions to represent employees of an employer who operates a business in the construction industry. That exception is further contained within a statute whose purposes include facilitating collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.

68. The Board also accepts the general proposition articulated in the caselaw relied upon by the unions to the effect that where two alternate constructions of a provision are possible, the one which is consistent with the Charter should be preferred to the one that is not. The unions argue that the Board must prefer an interpretation that is consistent with the Charter values articulated in *Health Sciences and Support – Facilities Subsector Bargaining Assn. v. British Columbia,* cited above. However, the unions do not suggest that there is an interpretation of the non-construction employer

provisions that is consistent with the Charter values articulated in that decision. Instead, they suggest that the non-construction employer provisions should be interpreted very restrictively precisely because those provisions, according to the unions, substantially interfere with collective bargaining such that they contravene the Charter. The Board is not, however, aware of any principle of statutory interpretation that requires a restrictive interpretation of provisions because they allegedly breach the Charter. The caselaw relied upon by the unions in connection with this argument does not further support this principle of statutory interpretation, which the unions are, in fact, urging the Board to adopt.

69. The unions' contention that the context of the provisions and the wording of the definition should be construed restrictively to mean that only an employer who has nothing to do with the construction industry, except for its own purposes and exclusively for its own purposes, can fall within this section, remains to be considered. The unions rely on the definition of "work" in *Words and Phrases* (1993 Thomson Canada Limited) as meaning "the expenditure of effort" and the definition of "construction industry" in the Act for the proposition that "do no work in the construction industry" should be interpreted to mean "expends no effort in the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other work at the site."

70. The unions suggest that "facilitating" the performance of construction work by others is sufficient to meet the definition, such that the IESO's activities in performing system impact assessments, which involve an expenditure of effort and are required before any construction activity by others can occur, represent facilitating construction or doing work in the construction industry within the meaning of the definition. It should further be noted that these assessments are the only alleged construction activities for which the IESO receives any direct monetary compensation. The IESO charges market participants to perform system impact assessments, which a proponent of a project is required to submit with its leave to construct application filed with the OEB. The IESO similarly charges the OPA to perform OPA assessments, which are also technical assessments of a proposed construction project.

71. The unions refer to the Board's decision in *Hudson's Bay Company*, cited above, in support of their position that the activities contemplated by the legislation include not only construction activities in the traditional sense, but also any expenditure of effort that "facilitates" the performance of construction activities. While the unions note that the term "facilitates" is not contained within the definition itself, they submit that that definition has been interpreted by the Board to include "facilitating" construction work. At para 53 and 54 of that decision, the Board analyzed the legislation as follows:

> 53. At this point, it is useful to quickly review the excerpts from Hansard upon which HBC relies. In our view, those excerpts do not advance HBC's position. The legislation that we are focused on needs no outside aides to interpretation to establish that when an employer performs or *facilitates* construction work only for itself, it meets the definition of "non-construction employer". A reading of the Hansard excerpt reveals that the government members sought to introduce legislation that would ensure that a coffee retailer or a bank engaged in construction to build or renovate its own stores or branches, could do so without being bound to the Provincial ICI construction agreements. But the Hansard excerpts say nothing about the Government's intentions in circumstances where the bank engages in

> construction for the benefit of the coffee retailer operating a kiosk in the bank branch. Hansard is silent about the kind of facts found in this case.
>
> 54. The Board must discern the Legislature's intentions from the Act. The licensees are unrelated persons from whom HBC expects compensation for the construction work it performs. HBC argued that is (sic) retains no amount of money to recover its costs in *facilitating* the construction and passes on any payment made by the licensee to the general contractor or subcontractors who performed the work. HBC repeats that it is not "in the business" of providing construction services. But as we set out earlier, the Act makes no distinction between businesses that *facilitate* construction, and those that perform it directly. We see no statutory basis to look behind the transaction between the licensee or manufacturer and HBC.
>
> [emphasis added]

In that case, the Board considered the relationship between the Hudson's Bay ("HBC") and retailers who carry on business in the department store. Under the terms of its agreement with certain retailers who were granted a license to set up shop in the department stores, the Hudson's Bay performed construction work to enable these licensees to display their wares. The Board found that when HBC built the basic demising walls and electrical and plumbing outlets, it was doing so for its own business because this is the minimum it must do to attract a licensee. However, when HBC provided finishing work in premises occupied by licensees, which might include providing fixtures and decorating, HBC was performing construction work for the licensee, an unrelated person. The Board therefore concluded that the HBC did not meet the definition of non-construction employer, reasoning as follows:

> 58. We conclude that HBC does not meet the definition of "non-construction employer". It operates a business in the construction industry by effecting construction. The work that the HBC performs to build for itself would permit it to be found to be a "non-construction employer". However, HBC's regular *facilitation* of construction work for licensees and manufacturers where it expects reimbursement for its expenditures in securing that work, means that HBC expects compensation from unrelated persons. Thus, the HBC cannot meet the definition of "non-construction employer."
>
> [emphasis added]

It is however apparent from the context in which the Board in that case used the term "facilitation" that the Board was not referring to any type of expenditure of effort that is in any way connected to the construction industry, but rather referred to those who effect construction by engaging contractors as distinct from those who are vendors of construction services.

72. As the Board in *Shell Canada Products*, cited above, noted in a similar context at para 49, "it is always dangerous to elevate words of a decision of the Board to the level of statutory language. The Board is simply attempting to explain the meaning to be given to a statute in the case before it." In *Shell Canada Products*, cited above, the Board also specifically addressed what constitutes "doing" work in the construction industry for the purposes of the definition in light of the reasoning in *Hudson's Bay Company*, cited above, as follows:

> 40. One issue was not addressed by the parties, but does flow logically from the Hudson's Bay decision. Shell does not routinely employ employees to perform construction work. Contractors whom Shell retains do the work. The term "employer in the construction industry" has been consistently found by the Board to include an employer which is bound to a construction collective agreement regardless of whether that employer performs the work directly using its own employees or indirectly through third party contractors (see for example, *Brant County Board of Education* [1986] OLRB Rep. Sept. 1187). For that reason Shell did not attempt to distinguish between work performed by contractors and work performed by its own employees. It is the performance of work which constitutes the "doing" of work in the construction industry for the purposes of this definition.

The Board in *Shell Canada Products*, cited above, properly interpreted what constitutes "doing" work in the construction industry for the purposes of the non-construction employer definition in the context in which the definition arises, being an exception to the definition of employer within the meaning of section 126 of the Act. This approach is also consistent with that relied upon in *Rizzo & Rizzo Shoes*, cited above, at para. 21, being that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

73. By contrast, the unions' suggestion that the term "do" work in the construction industry should be construed even more broadly to include any expenditure of effort in any way connected to the construction industry and which does not necessarily entail the performance of bargaining unit work is not consistent with the scheme or object of the Act. Such an interpretation would lead to absurd results, since virtually no one could ever meet the definition of "non-construction employer". As noted by counsel for the IESO, under the unions' interpretation even labour counsel paid by construction industry clients to represent them at the labour board proceedings would fail to meet the definition of non-construction employer since they are expending effort by providing legal services in a way that is connected to the construction industry. Similarly, a bank that engages contractors from time to time for its own benefit and which has a single construction industry client would fail to meet the definition advanced by the unions, since it would be expending effort in a way that "facilitates" construction activities.

74. The Board instead finds that doing work in the construction industry for the purposes of the definition must be interpreted in the context in which it arises and in light of the well-established jurisprudence concerning the term "employer in the construction industry" under which no distinction is made between bargaining unit work performed by contractors and bargaining unit work performed by one's own employees. The Board rejects the unions' suggestion that the term should be interpreted more broadly to include any expenditure of effort related to the construction industry and which need not include the performance of construction work, such that technical assessments performed by the IESO's engineers and interventions before the OEB are included in the definition. When the IESO's employees are performing system impact assessments and OPA assessments or participating as an intervenor in leave to construct applications, they are not, in the Board's view, "doing" work in the construction industry within the meaning of the definition.

75. As noted above, the work the IESO does performing system impact assessments and OPA assessments is the only alleged construction activity performed by the IESO for which it directly charges third parties. Given the Board's finding that this work does not in fact constitute doing work

in the construction industry within the meaning of the definition, the Board next turns to a consideration of whether the IESO receives different forms of "compensation" from unrelated persons for its other alleged construction activities.

Is the IESO compensated for its construction activities through the market fees?

76. As noted, the IESO does, from time to time, do work in the construction industry within the meaning of the definition, as for example, when it does office reorganizations and when it engaged contractors to perform the West Wing expansion. With respect to those instances in which the IESO engages contractors to perform construction work, the issue that arises is whether it receives compensation from an unrelated person for this work. The IESO contends that in all instances in which it has and does engage contractors to perform construction work, it is doing the construction work for itself and is not paid for that work by anyone. The unions, on the other hand, contend that the IESO is compensated for all of its activities, including its construction activities, by fees paid by market participants.

77. The Board cannot however agree that the market fees, from which the IESO recovers its costs of operations, represent compensation for any of the work the IESO performs in the construction industry. The evidence indicates that none of the fees charged by the IESO to market participants relate to the provision of construction services. The fees are further calculated on the basis of consumption of electricity and are not based on the cost of any of the IESO's construction activities. The requisite nexus between the construction work and the compensation in the form of fees is lacking in the present case. As such, regardless of whether the installation of RTUs, FRADS and telecommunication connections are properly characterized as construction activities, the necessary link is missing between these activities or other undisputed construction activities of the IESO (such as the West Wing expansion) and the payment of fees to the IESO by market participants.

78. In *ReNu Recycling Inc.*, [2007] O.L.R.D. No. 341 (January 26, 2007), the Board similarly found that the necessary link between the payment of compensation and the construction work was absent. The Board in that case consequently found that the responding party, ReNu, a scrap dealer, met the definition of non-construction employer even though it engaged in demolition work associated with the removal of scrap metal. The Board reasoned that ReNu is a metals vendor and not a demolition contractor, and that the payment of a purchase price by customers participating in the various metals markets is not "compensation" since no portion of the purchase price is tied to ReNu's costs of extracting these materials. There was further no connection between the price ReNu paid to Central Salvage to acquire the right to remove the metals and obtain title to them and the value of ReNu's work of extraction. The Board discussed the necessary link required by the definition, as follows:

> 62. This decision [*Hudson's Bay Co.*, cited above], together with others, show that the actual fiscal arrangements are more important than abstract economic theory or assumptions. Thus the entity performing the construction work must expect, as a result of a specific arrangement that the unrelated third party will provide payment, regardless of form, that is specifically attributable to that construction. This interpretation is consistent with the aim of this definition, which is the exclusion from the realm of construction industry collective bargaining of entities that do not perform construction work with the same economic considerations as employers operating construction businesses.

In the circumstances before it in *ReNu Recycling Inc.*, cited above, the Board found at para 67 that "[t]he essential compensatory linkage or attachment to the construction work is missing in both Central Salvage's agreement to accept ReNu's price of extraction and the market prices paid. Neither were paying for ReNu's construction work." The fact that ReNu contemplated that it could resell material at an overall profit such that it would recoup all of its costs including the labour costs associated with the extraction did not represent an expectation of compensation for its construction activities as contemplated in the non-construction employer definition.

79. Similarly, in the present case, the mere fact that the IESO recovers all of its costs of operation, including those costs associated with the construction work it requires from time to time at its operating facilities from fees charged to market participants does not mean that those fees represent compensation *for* the construction activities necessary to operate its business. As noted above, the non-construction employer definition requires that it is the construction work *for which* the third party is paying (See *Shell Canada Products,* cited above, at para 43). The definition requires a nexus between the construction and the compensation as distinct from construction activities which represent the cost of doing business and for which it hopes to recover its costs through sales or other forms of revenue. In assessing whether the necessary exchange has taken place, the Board has examined whether the construction activity performed is work necessary for the applicant to carry on its business or whether the applicant is doing the construction activity so that the third party can carry on its business.

80. The Board has further recognized that, even though the test remains the same, the evidence in this regard will look different where the applicant is a private body versus where the applicant is a public one. (*Greater Essex County School Board*, [2007] OLRB Rep. September/October 874). The situation in the present case is, to that extent, more closely analogous to those in which the Board has considered whether public funded school boards that engage in construction activities from time to time meet the statutory definition.

81. The bulk of the IESO's revenue comes from the market fees it charges to market participants in order to recover the costs of its operations, which are carried on in order to fulfill its statutory function of administering the markets and of overseeing the electricity grid for reliability purposes. In order to perform its statutory functions, it requires manpower, equipment and facilities and those facilities require construction work from time to time, including work associated with office reorganizations, expansions, and repairs. When the IESO engages contractors to perform construction work at its facilities, it is performing the construction work for its own benefit in order to fulfill its statutory functions. The construction activities performed at its facilities are not performed either at the behest of, or for the benefit of, the market participants, who ultimately cover those costs as well as all other costs of the IESO's operations through the payment of the market fees.

82. The situation is therefore similar to that before the Board in *Greater Essex County District School Board,* [2003] OLRB Rep. January/February 74 (January 22, 2003) and in *Windsor-Essex Catholic District School Board,* [2002] OLRB Rep. September/October 971 (October 17, 2002), in which the Board found that government funding to a school board that is used to pay for construction activity (e.g. building a new elementary school) is not "compensation" within the meaning of the definition of non-construction employer, since the funding the school board received was not payment for having performed the construction work. The Board in both cases found that, even though the school boards do construction work and expect funding, some of which is used to pay for construction activity, the funds are not paid in order for construction work to be performed for the

benefit of the giver of the funds. Similarly, in the present case, the market fees are not paid in order for the IESO to perform the construction activities it does at its various facilities. The IESO's construction activities are not further performed for the benefit of the market participants who pay the fees. They are performed for the IESO's own business in order to carry out its statutory objects of administering the markets and overseeing the grid for reliability purposes.

83. For all these reasons the Board rejects the suggestion that market fees represent compensation for the IESO's construction activities within the meaning of the non-construction employer definition.

Did HEPCOE compensate the IESO for the Re-lamping Work?

84. The unions also argue that HEPCOE, an entity unrelated to the IESO, and which occupied space at the Clarkson Control Centre under a license arrangement "compensated" the IESO within the meaning of the definition for the re-lamping work done on HEPCOE's premises at the Clarkson Control Centre. The unions note that the definition of "compensation" is sufficiently broad to include non-monetary compensation and that, in the case of the re-lamping work done at HEPCOE's premises, that compensation took the form of a mutual benefit of the on-going license arrangement, under which the IESO benefited through the convenience offered to its employees of having a credit union located within its premises.

85. In the Board's view, the ongoing mutual convenience of having a lessor/lessee arrangement is not sufficient to amount to compensation for the re-lamping work. Not only is the required nexus between the construction work and the alleged compensation missing, there is no evidence of an exchange of any kind. There is no evidence, for example, that HEPCOE threatened or even considered leaving the premises if the re-lamping work was not done by the IESO and no evidence of any change whatsoever in the relationship between the IESO and HEPCOE associated with the re-lamping work. Their arrangement under which HEPCOE had a license to occupy the space without the IESO charging it any fees carried on as before with no alteration whatsoever.

86. Similarly, in *Shell Canada Products,* cited above, the Board found that Shell's arrangements with lessees of its service bays were activities of a non-construction employer. In that case, Shell charged rent to lessees to use its service bays and performed any necessary construction work on the site. The construction costs were part of Shell's expenses associated with the site and those costs were applied to the rental revenue to determine Shell's profit. The rental income was not however found to be compensation for the construction costs associated with the site as the lease agreement does not track construction costs as a separate and variable item and the rent remains the same regardless of what amount, if any, Shell expends on construction work at the site. In *Hudson's Bay Company,* cited above, the Board also rejected the suggestion that where a licensee does not pay for construction work performed it must be assumed to be part of the licensing arrangement given the uncontradicted evidence that the cost of construction undertaken for the benefit of the licensing arrangement is not included in calculating the fee.

87. In the present case, the evidence indicates that HEPCOE is not even charged a fee for its license arrangement and there is no evidence that any consideration of construction costs, for the re-lamping work or otherwise, was a factor in its on-going arrangement that started prior to 1999, when the Clarkson Control Centre was occupied by Ontario Hydro. The Board therefore rejects the unions' suggestion that HEPCOE compensated the IESO for the re-lamping work.

Did the IESO receive compensation from entities in other jurisdictions for Interconnection Meter work?

88. The unions finally argue that the IESO received "compensation" within the meaning of the definition from unrelated persons in neighbouring jurisdictions when the IESO performed interconnection metering work at the Ontario border for its benefit and for the benefit of its neighbour. The evidence before the Board indicates that the IESO did this type of work in or around 2003 when updating the meters at Chats Falls. The IESO has also entered into an agreement with Hydro-Québec for the maintenance and repair of meters on the Ontario/Quebec border, under which the IESO pays for fixing three meters on its side of the border and Hydro-Québec pays for fixing four meters and any dispute about costs will go to arbitration. The unions note that it is a mutual advantage to the IESO and to Hydro-Québec to have interconnection meters installed and functioning properly along the Ontario/Quebec border and that the IESO is being compensated in kind for the construction work it does through its contractor, Hydro One.

89. Assuming that the arrangement between the IESO and Hydro One with whom the IESO has contracted to perform the interconnection metering work in issue is properly viewed as a contract for the provision of construction work by the IESO, the question remains as to whether the IESO was "compensated" for this work by an unrelated party, being Hydro-Québec. In determining whether "compensation" exists for the construction activities in issue, there must be the presence of an exchange for having been provided with construction services. The compensation received by an employer from an unrelated person must be for having engaged in construction activities in order to take the employer outside of the non-construction employer definition (*Windsor-Essex Catholic District School Board*, [2002] OLRB Rep. Sept./Oct. 971 (October 17, 2002)).

90. As noted above, in *Hudson's Bay Company*, cited above, the Board distinguished between construction work done by HBC for the benefit of the licensee and construction work performed by HBC for its own benefit. The Board noted that when HBC built the basic demising walls and electrical and plumbing outlets, it was doing the minimum required to attract a licensee and was therefore doing the construction work as part of its own business. However, when HBC did finishing work in the space to be occupied by the licensee, it did so for the benefit of the licensee and was compensated for that construction work when it was reimbursed for it by the licensee. Only the latter work took HBC outside of the non-construction employer definition.

91. Similarly, in *Shell Canada Products*, cited above, the Board found that certain construction activity performed by Shell for its Trading Partners took Shell outside of the definition while other construction activity performed for its own benefit and that of its Trading Partner operated as a joint venture did not. In that case, Shell owned and operated certain Terminals or bulk storage facilities used to store product. At two of these Terminals (Terminal 9 and 10), Shell entered into an agreement with the Trading Partner to provide access to the terminals and Shell owned, operated and maintained the sites as its own property. When Shell did certain capital improvements to the terminals and charged back a "capital cost" fee representing the amortized cost of this construction to its Trading Partner, the Board found that Shell had engaged in construction work to accommodate the business of a Trading Partner and expected to be compensated by the Trading Partner for having done so. The Board therefore found that construction work performed by Shell at these two terminals took Shell outside of the definition.

92. By contrast, the Board in that case found that construction activity performed by Shell at a third Terminal (Terminal 11) which Shell operated as a joint venture with a Trading Partner did not involve doing construction work for which it was paid by an unrelated person. In that instance, both parties jointly owned the facility and both shared the cost of the construction work. Even though the Trading Partner reimbursed Shell for the construction work, the money Shell received was money received on a flow-through basis by which the Trading Partner pays for its own construction. The Board therefore determined that the necessary exchange required by the definition was absent in the circumstances of this third Terminal. In that circumstance, even though Shell received money related to the construction activities from a third party, the Board found that Shell was not doing or performing work for the benefit of the Trading Partner, but rather that the Trading Partner was in effect simply paying for its own construction.

93. In the present case, there is no evidence of any monies or other forms of remuneration having changed hands between the IESO and any of its neighbours. In the case of the IESO and Hydro-Québec, each is generally responsible for installing, repairing and maintaining interconnecting meters on their respective side of the border. Both further require the data provided by the meters to perform their respective functions. As such, any construction work associated with the interconnection meters is performed for their mutual benefit. The arrangement reached between them is that each bears the cost and responsibility for the meters located on their respective sides of the border.

94. The situation in the present case is distinct from an in-kind compensation arrangement under which one neighbour, for example, agrees to build a deck for the other on the understanding that his or her neighbour will return the favour by finishing the other's basement. In these circumstances, they are compensating each other in-kind for construction activity for their own benefit only. The situation in the present case is instead more akin to an agreement between two neighbours to the effect that each will be responsible for building a portion of the fence dividing their properties, which fence they both require for their mutual benefit. Here, they are simply splitting the cost and responsibility for work they both need. In the Board's view, the necessary exchange required by the definition is missing in circumstances where each shares the cost and responsibility for construction activity required for their mutual benefit. Like the joint venture arrangement at Terminal 11 in *Shell Canada Products*, cited above, it cannot be said that the IESO is engaged in construction work (performed by Hydro One) for which it is compensated by Hydro-Québec.

95. In all the circumstances, the Board concludes that the evidence concerning interconnection meters does not indicate that the IESO has done work in the construction industry for which it expects compensation from an unrelated person.

Disposition

96. For all these reasons, the Board finds that the IESO has met the statutory pre-conditions for a declaration that it is a non-construction employer. This application is accordingly referred to the Registrar to list for hearing into the constitutional issue.

3385-05-R; 3403-05-U International Brotherhood of Electrical Workers, Local 586, Applicant v. **Lecompte Electric Inc.**, Responding Party v. Clayton Bloom and a Group of Objecting Employees, Intervenors

Certification – Certification Where Act Contravened – Construction Industry – Remedies – Unfair Labour Practice – The applicant chose to conduct its organizing drive through salting and by approaching a select number of employees, rather than to undertake a broad based grassroots campaign – The Board found that the employer committed unfair labour practices in two instances: coercive and intimidatory statements made at an office meeting and the improper discharge of a union organizer – Even with the addition of the union organizer, the applicant filed membership evidence on behalf of only 20% of the bargaining unit – In these circumstances, where the trade union had no meaningful contact with over 60% of the members in the bargaining unit at and around the time of the unfair labour practice complaints, the Board could not find that the union's failure to meet the 40% threshold was as a result of the unfair labour practices – The applicant union was not entitled to section 11 relief, however the Board did order reinstatement of the union organizer and other declaratory relief – Certification application dismissed; unfair labour practice remedies granted

BEFORE: *Jack J. Slaughter*, Vice-Chair.

APPEARANCES: *Ron Lebi, James Barry* and *John Bourke* appearing for the applicant; *Michael Ruddy, Serge Lecompte* and *Luis Pedroso* appearing for the responding party; *Clayton Bloom* appearing for himself and a group of objecting employees.

DECISION OF THE BOARD; April 15, 2008

1. Board File No. 3385-05-R is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"), specifically under section 8 of the Act. Board File No. 3403-05-U is an application filed under section 96 of the Act.

2. On March 30, 2006, the Board began its hearing into the section 96 application only. At the time, the Board was composed of Vice-Chair Jack J. Slaughter and Board Members Glenn Pickell and Alan Haward. Continuation dates were scheduled for late July 2006, but had to be cancelled due to the illness of Board Member Pickell. When it became apparent that Board Member Pickell would be unavailable for a protracted period of time, the parties sought an order for Vice-Chair Slaughter to continue to hear and determine this matter alone pursuant to subsection 110(12) of the Act. Such order was issued by Kevin Whitaker, Chair of the Board, on October 26, 2006. Vice-Chair Slaughter resumed hearing the section 96 application in Ottawa on December 5, 2006.

3. As a result of a line of questioning undertaken by counsel for the responding party of the applicant's witness John Bourke in the section 96 application, which pertained to the applicant's request for section 11 relief (automatic certification) in the certification application, the Board commenced hearing both files together effective December 14, 2006. All parties consented to this procedure and agreed all evidence heard by the Board could be applied to making its decision on the outstanding issues in both files.

4. The certification application was filed on January 10, 2006. At the time of filing the application, the applicant acknowledged it did not have at least forty per cent of the individuals in the proposed bargaining unit as members. Therefore, no representation vote was ordered. The applicant's right to certification is dependent on the outcome of its allegations of unfair labour practices made in its section 96 application, and whether they are sufficient to demonstrate the applicant's entitlement to relief under section 11 of the Act.

5. In its decision dated January 13, 2006, the Board (differently constituted) determined the appropriate bargaining unit in the certification application to be:

> all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of the responding party in all other sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman.

6. Fourteen persons are agreed to have been employed in the bargaining unit on the date of application:

(a) Sebastian Baker
(b) Clayton Bloom
(c) Luc Boucher
(d) Remy Chartrand
(e) Chris Corput
(f) Claude Desormeaux
(g) Eric Drouin
(h) William Geikie
(i) Guillermo Guidi
(j) Lee Klazinga
(k) Shawn Lemay
(l) David Martin
(m) Julien Savage
(n) Vincent Veilleux

7. It is an unusual and unfortunate feature of this case that, as a result of the pleadings and evidence adduced herein, all parties became aware of who had and who had not signed membership cards for the applicant. More specifically, in the course of seeking remedies under sections 11 and 96 of the Act, the applicant pleaded and led evidence that Messrs. McCormick, Brunet and Dugas had signed membership cards for the applicant and been dismissed by the responding party. Furthermore, Mr. Lemay, in the course of testifying for the responding party to rebut allegations made against him by the applicant, disclosed that he had signed a membership card for the applicant but subsequently changed his mind about it, and wanted the card returned or destroyed. These events are special aspects of this particular case. Nothing said or done in the course of rendering this decision should be taken as detracting in any way from the importance the Board attaches to the secrecy of membership

evidence and employee wishes, or the import of section 119 of the Act. However, the Board must deal with the evidence before it, and the manner in which that evidence is presented. It is a fact that only two persons of the fourteen listed above had signed membership cards: Chris Corput and Shawn Lemay. For reasons set out below, the responding party argues the Board should not give effect to Mr. Lemay's card. On the other hand, the applicant asserts that the responding party specifically retained Mr. Lemay in employment because he recanted his support for the applicant.

8. The applicant seeks to add Norm McCormick, Paul Brunet and Bernard Dugas to the list of employees in the bargaining unit, arguing that they qualify as such pursuant to subsection 1(2) of the Act, because they would have been so employed but for being dismissed by the responding party contrary to sections 70, 72 and 76 of the Act.

9. Mr. Clayton Bloom appeared in these matters on behalf of a group of employees objecting to the certification application ("The Group"). The Group initially consisted of all employees agreed to be in the bargaining unit, except Mr. Corput. Mr. Lemay no longer supported the applicant as of February 20, 2006. Apparently, Mr. Klazinga subsequently had a change of heart in the other direction, as he later testified on behalf of the applicant.

10. The Board must determine the outcome of the applicant's section 96 allegations and thereafter, decide whether the applicant's request for section 11 relief in the certification application will be granted. The parties agree there are three possible options for the Board in these matters:

> (a) if the Board finds no unfair labour practices have been committed, then the Board must dismiss the applicant's request for section 11 relief in the certification application;
>
> (b) if the Board finds unfair labour practices did occur, but did not cause the applicant to fail to reach the 40% membership threshold, then the Board must dismiss the applicant's request for section 11 relief in the certification application;
>
> (c) if the Board finds unfair labour practices did occur, and did cause the applicant to fail to reach the 40% membership threshold, then the Board must consider what relief is appropriate under section 11 in the certification application.

11. Sections 11, 70, 72 and 76 provide as follows:

> **11.** (1) Subsection (2) applies where an employer, an employers' organization or a person acting on behalf of an employer or an employers' organization contravenes this Act and, as a result,
>
> (a) the true wishes of the employees in the bargaining unit were not likely reflected in a representation vote; or
>
> (b) a trade union was not able to demonstrate that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appeared to be members of the union at the time the application was filed.

(2) In the circumstances described in subsection (1), on the application of the trade union, the Board may,

(a) order that a representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit;

(b) order that another representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit; or

(c) certify the trade union as the bargaining agent of the employees in the bargaining unit that the Board determines could be appropriate for collective bargaining if no other remedy would be sufficient to counter the effects of the contravention.

(3) An order under subsection (2) may be made despite section 8.1 or subsection 10(2).

(4) On an application made under this section, the Board may consider,

(a) the results of a previous representation vote; and

(b) whether the trade union appears to have membership support adequate for the purposes of collective bargaining.

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70. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

***

72. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

(b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person

seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

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76. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

12. The Board heard from a total of 12 witnesses over 15 days of hearing. The responding party called Serge Lecompte, Luis Pedroso, Shawn Lemay, Emmanuel Courchesne, and Clayton Bloom as witnesses. The applicant's witnesses were John Bourke, Chris Corput, Lee Klazinga, Paul Brunet, Bernard Dugas, Norman McCormick and Catherine Chafe. In assessing the credibility of these witnesses, the Board has considered what is most reasonable and probable in all the circumstances of this case, as well as the usual testimonial factors, which are: the clarity of the testimony; the consistency of the testimony; the demeanor of the witness; the firmness of recollection; the opportunity of the witness to see and hear what happened; and the ability of the witness to testify truthfully and avoid the tug of self-interest.

13. The management officials who testified for the responding party were Serge Lecompte, President/Owner, and Luis Pedroso, Project Manager/Estimator. The professional organizer who testified for the applicant was John Bourke. All of the remaining persons who testified were employees of the responding party at the relevant times, except Catherine Chafe, who unsuccessfully sought employment with the responding party in the same time period.

14. The issues to be determined by the Board are: (a) whether the responding party discharged Messrs. McCormick, Dugas and Brunet in violation of the Act; (b) whether the responding party's failure to hire Ms. Chafe is a violation of the Act; (c) whether the responding party's decision to retain Mr. Lemay in employment and register him as an apprentice electrician constitutes discrimination against other employees who were supporters of the applicant in violation of the Act; (d) whether various statements and conduct of the responding party generally, and in particular on December 20, 2005, constitute violations of the Act; (e) whether the Board should refuse to give any weight to the membership card signed by Mr. Lemay; and (f) whether the applicant's request for section 11 relief should be granted.

Argument and Overview

15. The responding party asserts that none of its actions constitute violations of the Act. It asks that both the certification application and the unfair labour practice complaint be dismissed. The responding party makes a number of specific submissions in support of its request.

16. The responding party says the Board should not give effect to Shawn Lemay's card. It claims that Mr. Lemay gave uncontradicted evidence. Mr. Bourke agreed at the time Mr. Lemay signed his membership card that the card would be "destroyed, pulled or not used" if Mr. Lemay later told Mr. Bourke he had "changed his mind about the union". The responding party maintains the card was signed as the result of a specific inducement by Mr. Bourke that amounts to misrepresentation in these circumstances. If the Board accepts this submission, the level of the applicant's membership support would be further reduced.

17. The responding party further claims the applicant's organizing campaign was exhausted on November 25, 2005. That was the day the last membership card submitted with the certification application was signed. Thereafter, the applicant went to what the responding party characterizes as "Step 2" in the organizing campaign. Step 2 included sending in Ms. Chafe to tape record her interview with Mr. Lecompte on December 8 or 9, and Mr. Brunet distributing leaflets and wearing his IBEW hard hat and tee-shirt on site on December 19 and 20. The responding party says Step 2 involved the applicant attempting to "provoke" the responding party into committing violations of the Act. In the time between November 25 and December 19, 2005, the responding party asserts the applicant was not attempting to sign up further employees, but was only communicating with these employees who had already signed membership cards. Therefore, the applicant's membership support was effectively capped at its upper limit by November 25.

18. The responding party emphasizes the fact that the applicant produced no tape recordings, transcripts or notes for the conversations it relies on involving Ms. Chafe and Mr. Lecompte; Mr. Brunet and Mr. Pedroso; and Mr. Corput and Messrs. Klazinga, Pedroso and Lecompte. The first two were admittedly tape-recorded; and the third was at least the subject of a contemporaneous handwritten statement made by Mr. Corput. The responding party asks the Board to draw the inference that there was nothing incriminating against the responding party on the tape recordings and the written statement. Otherwise, these items would have been put in evidence by the applicant.

19. With respect to the lay-offs of Messrs. McCormick, Brunet and Dugas, the responding party argues that it demonstrated in each case that the lay-off was due to a legitimate lack of work. Mr. McCormick was laid-off after the project for which he was hired to be the foreman came to an end. Mr. Brunet was laid-off when the G. G. Lalonde project where he was designated to be the foreman was delayed due to circumstances beyond the responding party's control. Mr. Dugas was laid-off in favour of retaining Mr. Corput after Mr. Dugas' attitude took a turn for the worse in December 2005.

20. The responding party concedes that a December 20, 2005 meeting at its office involving Messrs. Lecompte, Pedroso, Klazinga and Corput was inappropriate, but argues that the conversation therein was limited to "moving" Mr. Brunet off the particular job he was on. At most, it was an isolated incident of misconduct that was not communicated to, and did not impact upon, the actions of other employees.

21. The responding party submitted the following authorities: *A. Stork & Sons Ltd.*, [1981] OLRB Rep. April 419; *Primo Food Ltd.*, [1983] OLRB Rep. April 593; *Pattison Sign Group*, 2005 Can LII 18200 (ON L.R.B.) (May 19, 2005): *Alderbrook Industries Ltd.*, [1981] OLRB Rep. October 1331; *Z-Lite Jenamees*, [1995] OLRB Rep. Feb. 212; *C.S.P. Foods Ltd.*, [1982] OLRB Rep. March 352; *Maverick Mechanical Contractors Ltd.*, [1996] OLRB Rep. April 289.

22. Finally, the responding party argues there was nothing improper in Ms. Chafe's interview with Mr. Lecompte. All of the responding party's decisions on hiring and lay-offs were based legitimately on the lack of available work. Therefore, both applications should be dismissed.

23. The Group supported the positions taken by the responding party. The Group says the applicant failed to raise enough support to entitle it to a representation vote, and the evidence shows that business decisions were made in the responding party's best interests. The Group agrees the applicant engaged in deliberately provocative conduct. The Group urges the Board to dismiss both applications.

24. At the close of this presentation, the Group's representative presented the Board with statements submitted and signed by 13 employees. The Board ruled it would receive the documents and allow counsel to make submissions on the weight that could be given to them.

25. The applicant began its presentation by saying that the responding party was both prepared to engage in illegal conduct, and prepared to lie about it. The applicant argues that the responding party's illegality was applied "not with a sledgehammer, but with a surgical scalpel".

26. With respect to Mr. McCormick, the applicant says he was queried about his support for the applicant in his initial interview with Mr. Lecompte. The applicant asserts Mr. McCormick conveyed information to the applicant about the responding party's jobs, and talked to other employees about the applicant as a "senior member". It argues Mr. McCormick's lay-off was not "business as usual", because a foreman normally works to the completion of a job, and he was laid-off well before the job on which he was foreman was finished.

27. With respect to Mr. Brunet, the applicant says the evidence clearly demonstrates he was an active supporter of the applicant. The reactions of Mr. Pedroso and Mr. Lecompte in their respective conversations with Mr. Brunet and Mr. Corput disclose anti-union motivation on the part of the responding party, which manifested itself in the lay-off of Mr. Brunet because of his union activity.

28. With respect to Mr. Dugas, the applicant asserts the responding party made an express representation that he would work at the Navan School. His alleged "bad attitude" was a convenient excuse to justify the responding party's decision to lay him off as an identified union supporter once it became time "to circle the wagons".

29. The Chafe interview and Corput conversation provide further evidence of anti-union animus on the part of the responding party.

30. The applicant asserts its organizing activity was continuing in December 2005, although the campaign was "not progressing as the union would have liked". The applicant referred the Board to three decisions: *1443760 Ontario Inc. operating as Swing Stage Equipment Rentals*, [2007] OLRB Rep. May/June 485 (June 15, 2007); *East Elgin Concrete Forming Limited*, [2007] OLRB Rep. July/August 741 (July 18, 2007); *L & L Painting and Decorating Ltd.*, [2007] OLRB Rep. Sept./Oct. 887 (October 15, 2007). The applicant says its campaign remained alive as it was still being pursued, and the responding party's workforce was fluctuating. There was a nexus between the responding party's illegal actions and the applicant's failure to garner at least 40% membership support. There is no meaningful remedy here other than automatic certification.

31. The letters submitted by the Group cannot be given any weight. They came after the time for the Board to receive evidence. There is no negative inference to be drawn from the applicant's failure to introduce the tape recording or written statement. The applicant relies on the oral and documentary evidence before the Board in support of its allegations and the remedies it is seeking.

Analysis and Decision

32. This case involves complex and interrelated issues of fact and law. It also concerns a highly unusual, although perhaps not unique, form of organizing campaign undertaken by the applicant. Therefore, the Board will first sketch out the outline of the organizing campaign, then deal with the unfair labour practice allegations by reviewing the relevant events relating to each affected employee, and finally assess the applicant's request for section 11 relief in light of the outcome of the unfair labour practice charges.

33. This was a highly unusual organizing campaign. It was not a campaign that began with a professional organizer or business representative approaching a group of unorganized employees at work for an employer. Nor is it a case where one or more non-union employees of an employer approached a trade union to represent them.

34. Instead, this is a case about "salting". Salting is the practice of a trade union directing its members or supporters to obtain employment at a non-union employer, and then using their employment to launch a certification application against the employer.

35. Although some individuals and employers may find salting distasteful, there is nothing improper or illegal about it. This issue seems to have received more attention in the United States than Canada. One respected American legal journal has described salting as one way that trade unions can "challenge the success of employers' union-avoidance tactics by developing techniques for communicating more effectively with non-unionized workers": "Organizing Worth Its Salt: The Protected Status of Paid Union Organizers", 108 Harvard Law Review 1341 (1995). In *NLRB* v. *Town & Country Electric Inc.* 516 U.S. 85 (1995), the United States Supreme Court held that a worker may be a company's employee within the terms of the *National Labor Relations Act* 29 U.S.C. 152(3) even if at the same time the union pays that worker to help the union organize the company. Other interesting discussions of the issue south of the border are contained in *Architectural Glass & Metal Co.* v. *NLRB* 107 F.3d 426 (6th Circ., 1997) and *TIC The Industrial Company Southeast Inc.* v. *NLRB*, 126 F.3d 334 (D.C. Circ., 1997).

36. The term "salting" need not refer only to persons who are paid by trade unions to act as employee organizers. More generally, "salting" means a process whereby a trade union sends employee organizers to apply for jobs in a non-unionized workplace. The employee organizers need not receive any direct compensation from the trade union. However, in *Swing Stage supra*, this Board made a finding of unjust dismissal of a salt and ordered consequential relief in the form of automatic certification under section 11 of the Act where an employer terminated the employment of a 9-day employee whose pay was topped up by the Carpenters' Union to the first year apprentice rate under the Carpenters' Provincial Collective Agreement. Of course, the remedy granted will depend on the facts of each individual case. However, this Board has endorsed the principle that "salting" is a legal, permissible organizing tactic in the arsenal of construction trade unions.

37. This organizing campaign, however, is not about a short, swift campaign organized by one employee salt. To continue the military analogy, one might say it was not a blitzkrieg, but a siege.

38. According to John Bourke, the applicant's organizer in charge of organizing the responding party, the applicant's campaign began with Luis Pedroso obtaining employment with the responding party in November 2003. Persons wishing to become members of the applicant are first required to engage in salting activities, even if they have been members of the applicant previously, or are seeking to transfer their membership from other local unions in the IBEW (such as Mr. Pedroso who was seeking to transfer his membership from Local 353 in Toronto). Each person is given a list of "non-union shops" with high priority employers identified with an asterisk. They are to report to Mr. Bourke when they obtain employment with a target employer, and then things progress from there.

39. There is no evidence that the salts in this matter were paid any monetary compensation by the applicant while working for the responding party. However, certain salts did receive a form of reward by being granted subsequent membership in the applicant and being swiftly referred out to unionized employment.

40. The evidence shows that the applicant attempted to salt the responding party with the following persons: Luis Pedroso, Norman McCormick, Clayton Bloom, Paul Brunet, Remy Chartrand, and Catherine Chafe. All except Ms. Chafe obtained employment with the responding party. Messrs. Brunet and McCormick testified in support of the applicant, as did Ms. Chafe. Messrs. Pedroso and Bloom, on the other hand, actively opposed the applicant in this proceeding. Mr. Chartrand did not testify. His involvement as a salt was only indirectly disclosed in the testimony of Mr. Pedroso, who stated that Mr. Chartrand gave him a copy of the applicant's "Non-Union Shops" list after these applications were filed. Mr. Chartrand did not sign a card for the applicant herein, nor curiously is there any evidence he was approached to do so. His name appears as one of the Group of Employees opposed to the applicant.

41. Although the applicant's organizing campaign began in November 2003, with the hiring of Mr. Pedroso, it went no further at that time. Mr. Pedroso became a steady employee of the responding party, and moved into a management position in April 2004. The next salt to obtain employment was Mr. McCormick on July 11, 2005, followed by Clayton Bloom on September 6, 2005, Paul Brunet on September 26, 2005 and Remy Chartrand on October 17, 2005. Apart from a few telephone calls, the applicant engaged in no real organizing activity prior to November 2005.

42. Even in November 2005, the applicant's evidence of organizing activity is sparse. Only Paul Brunet was actively "talking up" the applicant to follow employees. There was an organizing meeting at the "Local Heroes" sports bar in Ottawa on November 24, 2005 where John Bourke and another IBEW organizer, Dean Sinnott, signed Shawn Lemay, Paul Brunet, Bernard Dugas and Chris Corput to union membership cards. Norman McCormick signed a union membership card alone for Mr. Bourke on November 25, 2005. Mr. Bourke knew Mr. Bloom was not in favour of the applicant, and did not approach him to sign a card. According to the evidence before the Board, the only other employees approached to sign cards were Julien Savage, Sebastien Baker and possibly Vincent Veilleux by Mr. Bourke at Carleton University in mid-November, and Mr. Veilleux and Guillermo Guidi by Mr. Brunet later in the month. There is no evidence the applicant contacted any other of the responding party's employees in November 2005.

43. With respect to the first two weeks of December 2005, the evidence is that the applicant only maintained telephone contact with its existing supporters, and sent out Ms. Chafe as a potential salt.

44. It was only after Mr. McCormick was laid off on Friday December 16, 2005 that the applicant ramped up its campaign by equipping Paul Brunet with a union hard hat, tee-shirt and tape recorder to wear to the Navan School site on December 20, 2005. The events in relation to that decision are described in more detail below.

45. The only other evidence of any card signing activity by the applicant is Mr. Bourke's testimony that one more union membership card was signed close to the end of December 2005. There is no evidence as to the circumstances of the signing of such card, and it was never submitted to the Board at any time.

46. With this organizing background in mind, the Board now turns to an examination of the events pertaining to the individuals identified at paragraph 14 above in the context of the applicant's unfair labour practice charges and the responding party's response to them.

Catherine Chafe

47. Catherine Chafe is a licensed journeyperson electrician. She has worked in the electrical industry since 1995. She received her Electrical Trade Qualification and Interprovincial Red Seal Certificate in 1999. Prior to arriving in Ontario in 2002, she worked for various unionized employers in British Columbia as a member of International Brotherhood of Electrical Workers, Local 213.

48. Some time after she arrived in Ontario, Ms. Chafe sought to transfer her membership into the applicant. In November 2005, she met with the applicant's chief organizer, John Bourke. Ms. Chafe understood that she would have to engage in salting activities as a pre-condition of being allowed to transfer her membership into the applicant. Mr. Bourke gave her a list of potential companies to which she could send her resume. The responding party's name appeared on that list with an asterisk beside it, indicating it was one of the high priority targets of the applicant.

49. The responding party had placed an advertisement with Human Resources Development Canada for licensed electricians. It did this from time to time. Pursuant to this advertisement, the responding party had hired Domingos Ledo on November 22, 2005 and Guillermo Guidi on November 28, 2005. Ms. Chafe sent the responding party a resume in response to the advertisement shortly after her meeting with Mr. Bourke. The responding party then arranged to interview her in early December 2005. Ms. Chafe and Mr. Lecompte disagree on the date of the actual interview. Ms. Chafe asserts it was December 8, 2005 while Mr. Lecompte says it was December 9, 2005. There is a contemporaneous written note from the responding party's files indicating the interview occurred on December 9, 2005, although nothing of real significance turns on this fact.

50. On the day of the interview, but prior to the interview itself, Ms. Chafe again met with Mr. Bourke. He outfitted her with a tape recorder for the purpose of tape recording her interview with Mr. Lecompte. She was not sure why she was equipped with a tape recorder, but thought it could be to "ensure it was a fair interview" and agreed in cross-examination that it was "possible" it could be for "launching a complaint" against the responding party. Mr. Bourke did not give Ms. Chafe a script or specific instructions for the interview other than "be yourself".

51. The only persons present at the interview were Mr. Lecompte and Ms. Chafe. They disagree on the length of the interview, whether Luis Pedroso was in the vicinity or not, and whether or not Mr. Lecompte told Ms. Chafe that the applicant was "stupid". Mr. Lecompte's evidence on the interview was brief: he asked Ms. Chafe some questions prepared by his wife; he thought she asked some "bizarre" questions about the number of employees the responding party employed and the work they did; and finally he told her the responding party was not hiring at that time but would keep her resume on file.

52. Ms. Chafe's evidence was not a great deal longer. She testified the interview began with a great deal of enthusiasm on Mr. Lecompte's part. This enthusiasm ended after Mr. Pedroso came by Mr. Lecompte's office following a conversation in French, which Mr. Lecompte had on his cell phone. Previously Mr. Lecompte had been very complimentary about Ms. Chafe's work experience as disclosed on her resume, which clearly included unionized employment. However, after Mr. Pedroso's appearance, Mr. Lecompte said that the applicant had been "sending guys to him", "was stupid because they liked his company better than waiting on the list" and "I'd imagine that's what they've done with you". She agreed he told her that the responding party was not hiring at that time and would keep her resume on file.

53. Subsequent to the interview, Ms. Chafe provided the tape recording of the interview to Mr. Bourke. However, the applicant did not seek to enter the tape into evidence. After the interview, Ms. Chafe was referred to work at three of the applicant's unionized contractors, starting on December 12, 2005. Ms. Chafe is currently employed as an electrical inspector by the Ontario Electrical Safety Authority as a member of Power Workers Union, Local 1000.

54. The responding party did not hire any new employees after the date of Ms. Chafe's interview, but in fact laid off three employees approximately one week later.

55. Having had the opportunity to observe the testimony of the two participants in the interview, and to consider the surrounding facts, and what is most reasonable and probable in the circumstances, the Board finds it more likely than not that Mr. Lecompte did make the statements attributed to him by Ms. Chafe. However, none of them amount to violations of the Act. Mr. Lecompte was right that the applicant was sending potential employees to him, and that Ms. Chafe was one of those potential employees. Merely calling a trade union "stupid" is not a violation of the Act in and of itself, and the applicant has proven no more than that. Ms. Chafe was not discriminated against in employment, because no one has been hired by the responding party since the date of her interview.

56. In final argument, the applicant quite properly conceded it sought no specific remedy arising from the events which transpired during the Chafe interview. At the end of the day, the absence of the tape at the hearing is irrelevant. Even on the applicant's best evidence, the Chafe interview discloses no violations of the Act. The applicant's complaint in respect of the Chafe interview is accordingly dismissed.

Norman McCormick

57. In its unfair labour practice complaint pleadings at paragraph 5, the applicant described Norman McCormick as a "key inside organizer".

58. Mr. McCormick has been an electrician since 1971. He was employed with various unionized employers in the Ottawa area from 1971 to 1996. From March 1997 to May 2005, he worked for Impact Electric in Airdrie, Alberta.

59. In the spring of 2005, Mr. McCormick wanted to return to Ottawa and to obtain work from unionized employers from the applicant. Mr. McCormick spoke to John Bourke, who told Mr. McCormick that he would "have to work non-union for a while" to regain his status at the hall. Mr. Bourke gave Mr. McCormick a list of non-union employers, with high profile employers identified with an asterisk. Mr. McCormick then sent out resumes to 10 – 15 potential employers. He worked for one of the asterisked employers, McGowan Electric, for 1 to 1½ months before being called for an interview by Luis Pedroso, the responding party's Project Manager.

60. Mr. Pedroso and Mr. Lecompte interviewed Mr. McCormick together. They were aware that he had been a member of the applicant, because they noted several unionized Ottawa area electrical employers on his resume – Comstock, Black & McDonald and Zeibarth Electric. They specifically were looking to hire a foreman for the responding party's Berrigan School project, someone who would become the third different foreman in only 4 months. Mr. McCormick specifically testified that Mr. Pedroso was "looking for a foreman for the Berrigan School".

61. Each of Messrs. Lecompte, Pedroso and McCormick testified about the job interview. The main topic was Mr. McCormick's qualifications as an electrician and a foreman. The topic of the applicant also came up. Both Messrs. Lecompte and Pedroso testified that Mr. McCormick raised the issue of salting – more specifically that Mr. McCormick had been told to do it and did not want to do it. Mr. McCormick agreed in cross-examination that he said he was not a salt. However, he also testified that he was asked if he was a union member and how he would vote in a representation vote, to which he claims he replied that he "didn't know". Both Messrs. Lecompte and Pedroso deny that this last part of the conversation occurred. Even assuming it did occur, Mr. McCormick's equivocal answer proved no barrier to obtaining employment with the responding party. Mr. McCormick started employment with the responding party as its foreman on the Berrigan School project on July 11, 2005.

62. According to both Messrs. Lecompte and Pedroso, Mr. McCormick got off to a good start as the foreman on the Berrigan School project. However, problems soon developed. Mr. McCormick grumbled that he did not have enough men or materials. Mr. Courchesne testified that there was a lack of planning and organization on the part of Mr. McCormick that was apparent early on, and about which he complained to management in August. Mr. Pedroso became aware of this issue at this time. Mr. Pedroso was concerned that the responding party had "guys looking for work" (in the sense that they were idle and waiting for duties to be assigned to them) and that Mr. McCormick was ordering materials twice a day, rather than the normal twice per week.

63. The responding party took action to address this problem in early September. At that time, the responding party hired Clayton Bloom for work on its Carleton University project. However, work on that ongoing project is intermittent in nature. So instead Mr. Pedroso sent Mr. Bloom out to the Berrigan School project to "give it a push".

64. Mr. Bloom's first day of employment with the responding party was September 6, 2005. Like Mr. McCormick, Mr. Bloom had come to the responding party as a "salt", going to the responding party after finding it with an asterisk on the applicant's list of potential employers. The

topic of salting did not come up in Mr. Bloom's interview with Messrs. Lecompte and Pedroso. Messrs. Bloom and McCormick discussed it briefly on September 6, 2005 in a conversation where Mr. McCormick said that he was "too old to salt" to Mr. Bloom. Other than reporting their hiring by the responding party to Mr. Bourke, neither Mr. McCormick nor Mr. Bloom undertook any organizing activity for the applicant through to the end of October 2005.

65. Over the time from September to mid-November 2005, Mr. Pedroso's frustrations with Mr. McCormick's performance as the foreman on the Berrigan project began to increase. Both Messrs. McCormick and Pedroso agreed on this point. Mr. McCormick testified that Mr. Pedroso said no to his requests for more men and materials "pretty well every time". Mr. Bloom stated that although Mr. McCormick had a "happy go lucky, nonchalant attitude", the latter was "not organized in ordering material or placing men". Mr. Bloom described these issues as "shortcomings that later became failures". By mid-November, the consulting engineer, the general contractor and on-site employees were all coming to ask Mr. Bloom for "help, two to three times per day". Around this time, Mr. Pedroso also told Mr. Bloom that the responding party had decided Mr. Bloom would be the responding party's foreman on the upcoming Barhaven School project.

66. Somewhere about the same time, Mr. McCormick felt "crapped on" by Mr. Lecompte over the loss of a drill on the Berrigan School project. As a result, Mr. McCormick decided to "support the union". He signed a union card for Mr. Bourke on November 25, 2005, in circumstances where no other employees of the responding party attended. In cross-examination, Mr. McCormick testified he did not speak to either Mr. Bloom or Mr. Courchesne about the fact he had signed a union card, and agreed with the proposition that Mr. Lecompte had "no information" that Mr. McCormick had signed for the applicant.

67. The evidence supporting Mr. McCormick's involvement in union activity is minimal. It certainly does not bear out the applicant's allegation that Mr. McCormick was a "key inside organizer". After he signed the union card, Mr. McCormick spoke about the applicant only to persons who had already signed a card, such as Messrs. Dugas and Lemay. He did nothing to recruit new members for the applicant. In Mr. McCormick's own estimation, he spoke to John Bourke "once or twice over six months".

68. Mr. McCormick did relate an alleged conversation with Mr. Bloom around December 7, 2005 wherein Mr. Bloom is said to have stated that he had "heard there was a union movement" and that if he saw a union representative he would "kick him from here to the curb and back". Mr. Bloom denies this conversation took place as Mr. McCormick states it did. Mr. Bloom agreed he used such language but at another place and time. Mr. Bourke placed Mr. Bloom's use of this language at yet a third place and time. Mr. Bourke also testified that Mr. McCormick was "fearing for his life due to his involvement with the union". However, this statement does not appear anywhere in the applicant's pleadings. Nor is it found anywhere in Mr. McCormick's testimony.

69. The Board is not prepared to give any weight to the alleged December 7, 2005 conversation. All the evidence indicates that Mr. McCormick and Mr. Bloom had a very good working relationship. Mr. Bloom was reluctant to criticize Mr. McCormick in his evidence. Mr. McCormick left Mr. Bloom a "good luck" note when he turned over his cell phone and keys to Mr. Bloom on his last day of employment. While Mr. Bloom has a distinct animosity towards the applicant, he has, and had, no personal animosity towards Mr. McCormick. None of Messrs. Bourke, Bloom and McCormick had perfect recall of events that occurred numerous months before they

testified, and all coloured their evidence somewhat to cast themselves in the best light. While the Board does not believe that any of them was being deliberately untruthful, the Board definitely believes that each exaggerated certain aspects of his testimony. At the end of the day, the Board finds it most likely that Mr. Bloom made disparaging comments towards the applicant at some time to Mr. McCormick, but that such comments were directed generally to the applicant and its business representatives, and did not disclose any knowledge of Mr. McCormick's support for the applicant in his signing of a membership card.

70. In December 2005, Ledcor, the general contractor at the Berrigan School project, put pressure on the responding party to complete its work there. Mr. Pedroso ordered that a "push" be put on the project. As a result, the responding party added a night shift of an additional 7 employees to work at Berrigan School on December 8, 2005 besides the regular day shift of 6 employees on Mr. McCormick's crew. Mr. McCormick worked 13½ hours on Thursday, December 8. He left early on Friday, December 9, 2005 after 3½ hours due to a "spider bite". Mr. Dugas also left after 3½ hours, but no explanation of this was sought by either party when he gave his evidence. Mr. McCormick did not work on the project on either Saturday, December 10 or Monday, December 12 although he did attend the responding party's Christmas party on the evening of December 10. Mr. McCormick worked normal hours of work on December 13 – 15, before his lay-off after 4 hours of work on December 16.

71. Mr. McCormick stated that Mr. Pedroso told him he could not work the Saturday because he "had too much overtime already". Mr. Pedroso denies this. In any event, it is common ground that Mr. Pedroso made no mention of union activity on the part of Mr. McCormick and Mr. Pedroso similarly denies knowledge of any such activity. Mr. Pedroso asserts that the decision was made by him to lay-off Mr. McCormick due to his job performance and the fact the Berrigan School job was coming to an end. After December 16, 2005, only fire alarm and finishing work was left to be done.

72. The applicant says that Mr. McCormick was dismissed by the responding party on account of his support for the applicant. Instead, the responding party promoted the anti-union Mr. Bloom. Furthermore, the applicant claims at a minimum Mr. McCormick should have been retained in the responding party's employ until the completion of the Berrigan School project.

73. The Board does not agree. The responding party had longstanding issues with Mr. McCormick's performance of his duties as foreman. His questionable departure from work on December 9 and absence on December 12 were not helpful in what was clearly "crunch time" on the project. His union activity was minimal in nature, as described above. In these circumstances, the Board finds it credible that Messrs. Lecompte and Pedroso did not know of Mr. McCormick's union activities and accepts their testimony in this regard. Mr. Bloom had to complete the time sheets Mr. McCormick normally did, not because Mr. Bloom usurped his position as foreman, but because Mr. McCormick was not around to complete them. Finally, it is not insignificant that the responding party laid off Domingos Ledo and Marc Dion on the same day as Mr. McCormick for lack of work. There is no suggestion by the applicant these lay-offs were improper. Instead, the responding party retained other union supporters in its employ while laying off these non-supporters.

74. Lastly, the applicant relies on a conversation between Mr. Lecompte and Mr. McCormick on the last day of Mr. McCormick's employment, where Mr. Lecompte wished Mr. McCormick good luck and told him to call McGowan Electric. The applicant suggests this is a sarcastic reference to its priority list of target employees. The Board does not agree. Mr. Lecompte appeared to genuinely

like Mr. McCormick, as did most of the individuals who testified, although Messrs. Pedroso and Courchesne felt otherwise. Mr. McCormick had worked successfully for McGowan Electric before, and Mr. Lecompte knew this. The Board finds Mr. Lecompte's comments were sincere, not sinister. The evidence confirms very little work was done at Berrigan School after Mr. McCormick's lay-off.

75. For all the foregoing reasons, the Board finds that Mr. McCormick's lay-off was made for valid business reasons, and was not tainted by anti-union animus. Hence, the responding party did not violate any provision of the Act in its treatment of Mr. McCormick.

Bernard Dugas

76. Bernard Dugas was hired by Serge Lecompte to work on the Berrigan School project under the supervision of Norman McCormick. The topic of unions did not come up during the job interview, although Mr. Lecompte assumed Mr. Dugas had been a union member from reviewing the past employers listed on his resume. However, the employer Mr. Lecompte identified as a unionized employer only became unionized after Mr. Dugas left its employ. Either way, it made no difference to the hiring decision. Mr. Dugas began employment as a second term apprentice electrician with the responding party on August 4, 2005.

77. Mr. Dugas' employment continued uneventfully for the next several months. The responding party was happy with his work. Mr. Lecompte testified that in early November 2005, he agreed with Mr. Bloom that Mr. Dugas should go with Mr. Bloom to the Barhaven School project once it began. Mr. Bloom stated that he learned of this decision in mid-November 2005 from Mr. Pedroso. Mr. Bloom felt he could get Mr. Dugas "on track" with "a positive attitude". Mr. Dugas remarked that Mr. Bloom told him about the upcoming assignment at Barhaven School in early December.

78. Mr. Dugas testified that he had signed a card for the applicant on November 24, 2005, in the meeting with fellow employees described above. This was prior to his discussion of the Barhaven School job with Mr. Bloom. Mr. Dugas did not talk to any other employees about his support for the applicant, save and except for some general discussions with Mr. McCormick.

79. Mr. Dugas testified that in the week ending December 24, 2005, Mr. Bloom again confirmed to Mr. Dugas that they would be working together at the Barhaven School.

80. However, apparently Mr. Bloom had a change of heart. He testified that right around the time of the Christmas break, he decided he could not bring Mr. Dugas on track, because "I'm not a babysitter". Mr. Bloom preferred to take Chris Corput to the Barhaven School project. He relayed this information to Mr. Pedroso, who in turn said he would look into the matter, and get back to Mr. Bloom after the Christmas break.

81. Messrs. Lecompte and Pedroso discussed the matter. They decided to place Mr. Corput on the project rather than Mr. Dugas for three reasons: Mr. Corput was more experienced; Mr. Corput had worked with bricklayers and blocklayers in the past on work similar to that to be done at Barhaven; and Mr. Dugas' attitude was "going a bit down the drain". The decision was communicated to Mr. Bloom on January 5, 2006 and shortly thereafter Mr. Pedroso had a brief meeting with Mr. Dugas where he told him that he was being laid off due to lack of work.

82. Mr. Dugas testified that he believed Mr. Bloom knew he had "signed for the union" but did not know how he knew. Mr. Dugas further testified that on January 5, 2006, Mr. Courchesne told him that Mr. Brunet was going to be laid off for promoting the applicant Mr. Courchesne denies that conversation or knowing Mr. Dugas would be laid off. Mr. Bloom denies knowing about Mr. Dugas' lay-off until the day it happened. Indeed, on the morning of the lay-off, Mr. Bloom says that he specifically told Mr. Dugas to have proper boots and gloves ready so he would not get frostbite when working outside at Barhaven the following Monday.

83. Having reviewed all the relevant evidence, the Board is satisfied that Mr. Dugas' lay-off was not tainted by anti-union animus. Essentially, Mr. Dugas' involvement with the applicant was limited to signing a union card at the meeting at Local Heroes on November 24, 2005. Mr. Corput did exactly the same thing. Either the responding party's management knew about that meeting or they did not. The Board believes they did not. All the participants at that meeting except Mr. Brunet testified they were careful to keep their involvement with the applicant secret. Those participants knew Mr. Bloom was anti-union and that Mr. Courchesne was close to management. They were not going to publicize their involvement with the applicant in any way. It is highly unlikely that any of Messrs. Lecompte, Pedroso, Bloom and Courchesne would have made the statements they are alleged to have made to Messrs. Corput and Dugas if they knew that both were union supporters. The Board does not believe Mr. Bloom knew that Mr. Dugas had signed a union card. The Board does believe that Mr. Courchesne made the statement about Mr. Brunet's lay-off attributed to him by Mr. Dugas, but there is a distinct difference between the overt union activity of Mr. Brunet and the covert union support of Mr. Dugas.

84. The bottom line is that in choosing Mr. Corput for the Barhaven project in place of Mr. Dugas, the responding party chose to retain one union supporter in the place of another. This cannot constitute anti-union animus even if the responding party did know about the November 24, 2005 union meeting, which the Board has found it did not. Once again, the Board notes that Messrs. Corput and Dugas were retained in employment after December 16, 2005 on which date Messrs. Ledo and Dion, who had not signed cards for the applicant, were laid off for lack of work.

85. Therefore, the Board finds no violation of the Act by the responding party in the lay-off of Bernard Dugas.

Shawn Lemay

86. The applicant alleges that Mr. Lemay was an unregistered apprentice electrician who only became registered as an apprentice after revealing that Messrs. Dugas and Brunet signed cards for the applicant. The applicant further alleges that Mr. Lemay was then kept in employment while union supporters were laid-off. For its part, the responding party says Mr. Lemay's union card should not be counted as membership support for the applicant, because he expressly asked for his card back based on an undertaking given to him by John Bourke.

87. Mr. Lemay was hired by the responding party as a helper or labourer on August 15, 2005. He was recommended by Eric Mongeon, a former foreman for the Berrigan School project. Mr. Lecompte interviewed Mr. Lemay on his own. At the interview, Mr. Lemay stated that he was looking for an employer where he could be registered as an apprentice electrician. Mr. Lecompte replied that he would register Mr. Lemay as an apprentice at such time as the responding party could

do so but still maintain the ratio of apprentice to journeyperson electricians required by the *Trades Qualification and Apprenticeship Act* R.S.O. 1990 c.T.17 as amended ("the TQA").

88. Although the enforcement of the TQA ratio is not a matter within the jurisdiction of the Board, both parties addressed this issue in their evidence. Arguably, it is relevant to the alleged preferential treatment of Mr. Lemay by the responding party, but only tangentially so. The evidence on this issue is mixed. Messrs. Lemay and Courchesne testified that Mr. Lemay restricted himself to labour/helper duties, and did not perform electrical work. On the other hand, Mr. Dugas, a second term apprentice electrician, testified that Mr. Lemay worked alongside him, performing the same work. Mr. McCormick, the foreman on the Berrigan School project where Mr. Lemay worked throughout, described Mr. Lemay as a "gofer", who he assumed was an apprentice electrician. Mr. McCormick, the applicant's alleged "key inside organizer" was obviously not too concerned about the "ratio" on a project where he was the foreman. The Board concludes it is more likely than not that Mr. Lemay did at least some apprentice electrician's work, although the dividing line between labour/helper work was not closely explored in the evidence. In any event, the issue is only relevant in this case to the extent it sheds light on the unfair labour practice issues.

89. There is no question Mr. Lemay maintained an ongoing interest in becoming registered as an apprentice electrician. This is one of the reasons he was interested in the applicant. Mr. Lemay attended at the organizing meeting at Local Heroes on November 24, 2005. He testified that this is where he signed a union card. He said he felt a lot of "peer pressure". He claims Mr. Bourke told him that he could change his mind. Mr. Lemay told the Board that he called Mr. Bourke the next day and again a few days later when Mr. Bourke told him the union card "would be destroyed".

90. Mr. Bourke's version of events is different. Mr. Bourke did not make any reference to the cancellation of a union card on November 24, 2005. He agrees Mr. Lemay did telephone him the next day, asking for his union card back. Mr. Lemay was afraid Mr. Lecompte would find out he had signed a union card and would fire him. Mr. Bourke assured him the card was confidential, and added that the applicant could help Mr. Lemay with apprenticeship issues. A few days later Mr. Lemay called again saying he "didn't want a union card anymore". Mr. Bourke said he would respect Mr. Lemay's wishes. However, by that time the card was already in the possession of the applicant's Business Manager James Barry. Mr. Lemay's membership card was submitted as membership evidence by the applicant in this application.

91. In all the circumstances, the Board is not persuaded that it should not give effect to Mr. Lemay's union card as evidence of support for the union. The Board does not believe a construction trade union organizer of five years' experience like Mr. Bourke would agree to destroy a hard-won piece of membership evidence in a difficult organizing campaign. Mr. Bourke's comment that he would respect Mr. Lemay's wishes is at least somewhat ambiguous, and he no doubt wanted to reassure an individual who by both accounts was having serious second thoughts about signing a union card, whatever the reasons for that belief. At the end of the day, Mr. Lemay either simply had what is called a "change of heart" in the Board's jurisprudence (see CASES to be cited) or at most had his card submitted under a cloud of circumstances that might provide grounds for the ordering of a representation vote, but not ground for disregarding the card altogether (see CASES to be cited). In either case, these circumstances do not provide cause for the Board to disregard the card altogether.

92. The Board finds that Mr. Lemay did not disclose the names of the union supporters at the November 24, 2005 meeting to the responding party until February 6, 2006, well after the events in

issue in this application. Both Messrs. Lemay and Lecompte testified to this fact in a credible manner. Mr. Lemay's comments about being found out as a union supporter in his conversation to Mr. Bourke support this assertion, as did his demeanour in his testimony. All of Messrs. Lemay, Dugas, Corput and McCormick were careful not to advertise this support for the union in any way, and only talked about it amongst themselves. The responding party laid off non-union supporters Dion and Ledo in mid-December 2005, while retaining Lemay, Corput and Dugas. The applicant's assertion that Mr. Lemay would identify Messrs. Dugas and Brunet as union supporters to the responding party, while not identifying Mr. Corput as such makes no sense. The Board finds that the details of the November 24, 2005 organizing meeting were not known to the responding party until the time it received the unfair labour practice complaint from the applicant.

93. Therefore, the responding party's actions in registering Mr. Lemay as an apprentice electrician were untainted by anti-union animus. On December 19, 2005, Mr. Lecompte registered Mr. Lemay as an apprentice electrician. It was Mr. Lecompte's first opportunity to do so while maintaining compliance with the statutory ratio. Mr. Lemay was taking the place of another registered apprentice, Sebastian Baker, who was leaving the responding party's employ for 6 months for medical reasons. The applicant did not challenge the evidence surrounding the departure of Mr. Baker.

94. For all the foregoing reasons, the Board rules that Mr. Lemay's membership card shall be counted as evidence of his membership in the application, and that the responding party's actions in respect of Mr. Lemay do not amount to any violation of the Act.

Paul Brunet

95. Paul Brunet applied for employment with the responding party because he needed to act as a "salt" to gain re-admission to membership in the applicant. He was interviewed by Messrs. Lecompte and Pedroso. The issue of unions was not discussed at the interview. The responding party hired Mr. Brunet as a journeyperson electrician. He commenced employment at the Berrigan School project on September 26, 2005.

96. His first two months of employment were uneventful. He testified that he did attend at Local Heroes on November 24, 2005 where he signed a union card. Earlier Mr. Brunet had spoken to Messrs. Dugas and Corput about the applicant at this local "watering hole" at a few after-work get-togethers. After the cards were signed, he stayed in touch with Messrs. Dugas, Corput and Lemay on union-related issues.

97. In mid-December 2005, John Bourke spoke to Mr. Brunet about "stepping up" the applicant's organizing efforts because the organizing campaign was "kind of at a standstill". Mr. Brunet then discreetly distributed IBEW leaflets at the responding party's Navan School project during lunch hour. It was agreed that he earlier had spoken to Messrs. Veilleux and Guidi about the Union. The crucial turning point came on December 20, 2005 when Mr. Brunet wore an IBEW hard hat and tee-shirt to the Navan School project. Mr. Brunet was now engaging in overt support of the applicant. Mr. Brunet was also wearing a tape recorder supplied to him by Mr. Bourke. Mr. Pedroso arrived on site, and requested several times that Mr. Brunet remove or replace the hard hat, which Mr. Brunet refused to do. There are no material discrepancies between the testimony of Messrs. Brunet and Pedroso. Mr. Pedroso wanted the hard hat removed or replaced because the responding party was

a non-union company, but he did not specify any consequences for Mr. Brunet if he failed to do so. Neither party sought to introduce the tape of the conversation into evidence.

98. In early afternoon, Lee Klazinga, the foreman for the Navan School site, and Chris Corput, attended at the responding party's offices. Mr. Klazinga went there to discuss the "Brunet situation" with Messrs. Lecompte and Pedroso. Mr. Corput was invited to join the conversation when he entered the office for another purpose.

99. All four individuals testified and provided their versions of the conversation, Messrs. Lecompte and Pedroso deny saying anything about closing the business or laying off Mr. Brunet. Both say the topics of Mr. Brunet and the union were discussed and that Mr. Lecompte said he had consulted a lawyer (Mr. Ruddy) who told him not to get involved. Mr. Pedroso agrees he made some negative comments about the applicant.

100. Mr. Corput recalls the conversation more vividly. He also recalls that Mr. Lecompte said he had spoken to a lawyer. However, according to Mr. Corput, Mr. Lecompte went on to say Mr. Brunet had to be moved off-site, and eventually the responding party would "get rid of him". Mr. Corput agreed that Mr. Pedroso had made the comments contained in Mr. Pedroso's testimony. Beyond that, Mr. Lecompte asked Messrs. Klazinga and Corput to keep him informed of what was going on at the Navan School site; told Mr. Klazinga to be careful who was working weekends because of the union; that he didn't want to be unionized; and that he shouldn't be telling them this, but if he didn't, he was "fucked anyway".

101. Mr. Klazinga's recall of the conversation was that it lasted 15-20 minutes. He stated that Messrs. Lecompte and Pedroso wanted to know what Mr. Brunet did and said, and if the union was talked about on site. Mr. Lecompte was "worried about his business". Mr. Pedroso felt "screwed over" by the union. Mr. Klazinga recalled that he "thought they were going to take Mr. Brunet off the job" but did not know why.

102. The Board accepts Mr. Corput's version of the conversation. The details of statements made therein are consistent with the testimony of the other witnesses where they admit making the statements. The statement about the fate of Mr. Brunet is consistent with the more vague recollection of Mr. Klazinga, who did not sign a card for the applicant, but testified as a witness called by the applicant. The denials by Messrs. Lecompte and Pedroso about threats to Mr. Brunet and plans to avoid unionization do not strike the Board as credible. Mr. Lecompte is not as naive about the applicant as he would have the Board believe. Mr. Pedroso is a sharp, seasoned individual who has had negative experiences with the IBEW. They wanted to prevent unionization. It is logically consistent that they would plan to phase out or eliminate from the workplace the one visible supporter of the applicant. They clearly did not identify Mr. Corput as a supporter of the applicant, nor did they associate any of the other card signers with the applicant.

103. Mr. Brunet did not work on Wednesday, December 21, 2005. On December 22, 2005, he and Mr. Pedroso had another on-site conversation about Mr. Brunet's hard hat with the IBEW sticker. Again, Mr. Pedroso wanted it removed or replaced. Again Mr. Brunet refused. Yet again Mr. Brunet kept the hard hat without any threats of consequences. This conversation was also tape recorded, but again no party sought to introduce the tape into evidence.

104. Mr. Brunet worked on Friday, December 23, 2005. That was the last day before the responding party's 2005 Christmas break.

105. Mr. Brunet never returned to work for the responding party in 2006 after the Christmas break. It is common ground between the parties that Mr. Brunet had been designated as foreman for the upcoming G. G. Lalonde boat warehouse job by mid-December 2005. However, the evidence discloses that the G. G. Lalonde job was indefinitely delayed beyond the winter of 2006 due to circumstances beyond the control of the responding party.

106. Mr. Brunet says he was told that he would be working at the Navan School in 2006 if the G. G. Lalonde job did not start on time. However, the testimony of the other witnesses and the alleged circumstances of the making of this statement cast significant doubts that such a statement was ever made to Mr. Brunet. At the time of the alleged making of that statement, Mr. Brunet had not worked one day at the Navan School. In addition, subsequent testimony and documentary evidence clearly rebutted his spontaneous assertion in the witness stand that the responding party had not paid him his vacation pay. The Board does not find Mr. Brunet's assertion about being told he would be working at the Navan School credible in these circumstances.

107. However, this does not mean that Mr. Brunet's lay-off is not suspect. Firstly, there are the comments of Messrs. Lecompte and Pedroso to Messrs. Klazinga and Corput on December 20, 2005. Secondly, there are the comments Mr. Courchesne made to Mr. Dugas on the very day Mr. Brunet was laid-off, January 5, 2006, that Mr. Brunet was to be laid off for promoting the IBEW. The Board finds such comments were made by Mr. Courchesne. The Board is satisfied that Mr. Courchesne was not consulted by, or involved in, the decision-making process by Messrs. Lecompte and Pedroso, but given Mr. Courchesne's close relationship with management, the Board concludes he came upon this "inside information" in some manner that trickled down from senior management.

108. Furthermore, the responding party's explanation for Mr. Brunet's lay-off is problematic. Messrs. Lecompte and Pedroso assert that Mr. Brunet was designated for the foreman position on the G. G. Lalonde job, and that when it did not start on time, they decided to lay him off rather than break up established crews on other projects. This does not ring true. Mr. Lemay, who had worked at the Berrigan School project in December 2005, was at work on the Navan School during the week ending January 7, 2006. Two new employees were assigned there the week ending January 14, 2006. As many as eight employees worked there on the week ending January 21, 2006. Mr. Brunet had seniority over various employees assigned to work there. Moreover, he had been designated to become a foreman by mid-December 2005 (after he signed a union card, but before his overt union activity). It is normal practice in the construction industry to keep a foreman employed in another capacity while waiting for his next foreman job to start. Indeed, that is exactly what the responding party did with Clayton Bloom in putting him to work at Berrigan School while waiting for the Carleton University project to start. In the vernacular, "you keep your foremen working so you don't lose them".

109. In these circumstances, the Board finds that Mr. Brunet would have been gainfully employed as a journeyperson electrician by the responding party in 2006, but for his overt display of support for the applicant. More specifically, the Board finds that the responding party refused to continue to employ Mr. Brunet because he was exercising rights protected under the Act and that such conduct violates sections 70, 72 and 76 of the Act, as do the anti-union statements made by Messrs. Lecompte and Pedroso to Messrs. Corput and Klazinga on December 20, 2005.

110. Accordingly, the Board finds that the responding party violated sections 70, 72 and 76 of the Act. Mr. Brunet shall be considered an employee in the bargaining unit pursuant to subsection 1(2) of the Act, which provides:

> **1.** (2) For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of the person's ceasing to work for the person's employer as the result of a lock-out or strike or by reason only of being dismissed by the person's employer contrary to this Act or to a collective agreement.

The Board further directs that the responding party is to compensate Mr. Brunet for all losses incurred arising from the responding party's violation of the Act.

Applicant's Request for Section 11 Relief

111. The Board has found that the responding party committed unfair labour practices in two instances: the improper comments and threats made in the December 20, 2005 office meeting with Lee Klazinga and Chris Corput; and the improper discharge of Paul Brunet. The Board must therefore consider whether these unfair labour practices caused the applicant to fail to demonstrate that 40 per cent or more of the individuals in the bargaining unit appeared to be members of the applicant on the date the certification application was filed.

112. With the addition of Paul Brunet to the list of employees employed in the bargaining unit on the date of application, the applicant filed membership evidence on behalf of 3 out of 15 individuals, for a membership level of 20 per cent. There is evidence that Mr. Bourke approached Julien Savage and Sebastian Baker about joining the applicant, but only one time in November 2005, well before the unfair labour practices occurred. Mr. Bourke may have also approached Vincent Veilleux at this time. Paul Brunet subsequently approached Mr. Veilleux and Guillermo Guidi about membership in the applicant. Again, this approach was a single attempt that took place before the events that the Board has found to be unfair labour practices. There is direct evidence that no one from the applicant spoke to Eric Drouin. The applicant knew Clayton Bloom was opposed to the unionization of the responding party. There is no evidence whatsoever of the applicant attempting to solicit membership evidence from any other employees of the responding party, although Lee Klazinga and Remy Chartrand had contact with the applicant in one form or another.

113. In these circumstances, the Board cannot find that the unfair labour practices committed by the responding party caused the applicant to fail to reach the 40 per cent membership threshold. The applicant chose to conduct its organizing campaign through salting and approaching a select number of the responding party's employees, rather than to undertake a broad-based grassroots campaign. There is nothing wrong with this in principle. It is not the Board's place to question the wisdom of a trade union's organizing tactics. However, the Board cannot possibly find a trade union has failed to meet the 40 per cent membership threshold due to unfair labour practices where the trade union has no meaningful contact with over 60 per cent of the members in the bargaining unit at and around the time the unfair labour practices occurred. As Mr. Brunet candidly put it in his evidence, the applicant's organizing campaign was "kind of at a standstill" before Mr. Brunet began his overt union activity, which in turn provoked the responding party's unfair labour practices. No organizing activity occurred after Mr. Brunet's lay-off. Nor is there any meaningful evidence of organizing

activity by the applicant after the responding party's December 20, 2005 meeting with Messrs. Klazinga and Corput.

114. In these circumstances, the cases provided by the applicant in support of its argument are distinguishable. In *East Elgin supra*, there was a captive audience meeting attended by most, if not all, of the affected employees; threats of physical violence to a person acting on behalf of the union; threats to employees' job security; and evidence the union's organizing campaign "was dead after the meeting". The Board concluded that no other remedy than automatic certification would be sufficient to counter the effects of the employer's contraventions of the Act. In *Swing Stage supra*, the employer discharged the union's employee organizer who had been promoting the union to the members of his four man crew. The Board made a specific finding that the discharge was "severe and immediate" and served "the purpose for which it was intended – to abruptly and effectively end the organizing campaign". On these facts, the Board found that as a result of the abrupt discharge of one employee organizer on a four man crew, the prerequisites for automatic certification under section 11 of the Act were made out.

115. However, each case must be decided on its own facts. The key legal principle is that the union's failure to attain the 40 per cent membership threshold must occur as a result of the employer's contraventions of the Act. The evidence necessary to prove such a linkage will vary with the circumstances of each individual case. There can be no hard and fast rule as to the requirements for proof, as each individual organizing campaign is different. For present purposes, the Board simply finds on the evidence herein that the applicant has not demonstrated the necessary nexus between the applicant's failure to reach the 40 per cent membership threshold and the responding party's contraventions of the Act. The termination of a union supporter standing alone does not provide sufficient reason for the granting of automatic certification. As the Board noted at paragraph 37 of *L & L Painting*:

> "A discharge is not simply a single counter that, once inserted into an organizing campaign, will inevitably produce a certificate."

116. This is not to say that the Board does not consider the discharge of a union supporter to be a very serious matter. The Board must be ever vigilant to protect the statutory rights prescribed by the Act, and to fashion effective remedies for any violations of those rights. At the same time, a party is not entitled to a remedy unless it proves its entitlement thereto under the provisions of the Act. Here the applicant is not entitled to a remedy under section 11 of the Act because it has not shown that its inability to meet the 40 per cent membership threshold was a result of the responding party's violations of the Act. As the Board recently stated in *K. D. Clair Construction Ltd.*, Board File No. 2609-07-R, dated February 26, 2008, the burden on an applicant in a section 11 case is "to establish that it was *not able* to demonstrate 40 percent or more support among the employees in the bargaining unit *as a result* of the unfair labour practices committed by the responding party". Therefore, the applicant is entitled to remedies under section 96 of the Act for the violations of sections 70, 72 and 76 by the responding party, but not to relief under section 11.

117. At the hearing in this matter, the applicant declined the opportunity to suggest alternative remedies in the event the Board did not accede to its section 11 request. This was a tactical decision the applicant was entitled to make. Nevertheless, the Board has found that section 11 relief is not warranted, but that there are specific violations of the Act by the responding party that do require redress. The responding party must not be allowed to benefit from its violations of the Act.

Employees must be notified the Board will protect the rights of employees and trade unions to organize pursuant to the statutory guarantees of the Act.

118. The Board finds that the appropriate remedies in this case are ones that reinstate Mr. Brunet to employment with the responding party and fully compensate him for any losses suffered as a result of his unlawful discharge, and clearly bring home to employees that the right to organize is a meaningful one that they are free to exercise should they so choose. Therefore, the Board will order: that the responding party fully compensate Mr. Brunet for any losses arising from its violations of the Act; that all bargaining unit employees shall be provided with a copy of this decision; and that the applicant shall be permitted an opportunity to address bargaining unit employees for a one hour period out of the presence of any member of management. Such remedies will work to ameliorate any "lingering psychic effects" of the unfair labour practices: see *Radio Shack*, [1979] OLRB Rep. Dec. 1220, application for judicial review dismissed (1980), 30 O.R. (2d) 29 (Div. Crt.); *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254; *Wilco-Canada Inc.*, [1983] OLRB Rep. June 989.

119. The Board has not given weight to the belated petition submitted by Mr. Bloom at the conclusion of the hearing on behalf of all the bargaining unit members except Messrs. Brunet, Corput and Klazinga, or the earlier petition submitted by Mr. Bloom in February 2006 on behalf of the same group of employees. Neither petition meets the timeliness or evidentiary standards established by the Board's jurisprudence. However, the Board notes that the contents of the petitions are consistent with the Board's findings herein, and the reality in the responding party's workplace reflected in the oral testimony tendered in this matter that at the time of the culmination of the applicant's organizing campaign a minority pro-union group of workers co-existed with a significantly larger majority group who did not support the applicant. At the end of the day, it is the freely made choice of the workers that must prevail.

Summary and Disposition

120. For all of the foregoing reasons, the Board finds that the responding party violated sections 70, 72 and 76 of the Act in two instances only: its coercive and intimidatory statements made at the December 20, 2005 meeting in its office; and the discharge of Paul Brunet. All other allegations of unfair labour practices made by the applicant are hereby dismissed. At the same time, the Board further finds the applicant is not entitled to section 11 relief because its failure to reach the requisite membership threshold did not result from the responding party's violations of the Act.

121. The Board hereby disposes of these matters by issuing the following relief:

(a) A declaration that the responding party has violated sections 70, 72 and 76 of the Act;

(b) An order that the responding party reinstate Paul Brunet to employment and compensate him for any losses arising from the responding party's violations of the Act;

(c) An order that the responding party at its own expense provide a copy of this decision to each bargaining unit employee;

(d) An order that the responding party permit the applicant access to its shop for a maximum of one hour during working hours (at a mutually agreeable time) for the purpose of convening a meeting with bargaining unit employees, in order to address those employees out of the presence of any member of management;

(e) An order that the certification application is hereby dismissed pursuant to clause 8.1(5)7 of the Act.

122. The Board will remain seized of this matter in the event the parties are unable to agree on the compensation payable to Mr. Brunet or the implementation of any other aspect of the remedies ordered herein.

123. Finally, the Board wishes to thank counsel and Mr. Bloom for the professionalism, skill and co-operation demonstrated by them in the litigation of a long and contentious case. Each represented his party's interests with vigour and integrity, while maintaining a sense of decorum in keeping with the best traditions of the Board.

124. The responding party is directed to post copies of this decision immediately, in a location or locations where they are most likely to come to the attention of the individuals in the bargaining unit. These copies must remain posted for a period of 30 days.

0059-06-ES; 0061-06-ES Lorraine Fraser Viscount Residence, Applicant v. Ms. Shirley Coyea and Director of Employment Standards, Responding Parties; Kuipers Residential Homes, Applicant v. Mr. Dana Grant and Director of Employment Standards, Responding Parties

Employment Standards – Employers, caring for adult schizophrenics, sought review of an ESO's decision that their employees did not fall within the statutory meaning of "residential care worker" under Regulation 285/01 of the ESA – The Board accepted the definition in *Pacaldo* and the ESA Interpretation Manual that for a person to be found to be developmentally handicapped the handicap must have occurred during the person's formative years (namely, before 18 years) – Given that there was no evidence before the Board suggesting an onset of schizophrenia before the age of 18 with any of the residents, the Board found that none of the residents met the definition of "developmentally handicapped" and hence the employees were not residential care workers – The Board also noted that the purpose of the ESA and its exemptions is to protect the entitlement of workers to basic working conditions – Application dismissed

BEFORE: *Kelly Waddingham*, Vice-Chair.

APPEARANCES: *Chris White* for the applicant; *Lorraine Fraser* for Lorraine Fraser Viscount Residence; *Tessa Kuipers* for Kuipers Residential Homes; *Shirley Coyea* for the responding party; *Brian Blumenthal* for the Director of Employment Standards.

DECISION OF THE BOARD; April 11, 2008

1. These are two applications by two employers (Viscount Residence and Kuipers Residential Homes) for review of the decisions of an Employment Standards Officer to issue Orders to Pay and Compliance Orders.

2. The employers operate small residential group homes for adults with a primary or secondary diagnosis of schizophrenia. They contend that the employees who work in the homes are "residential care workers", and are therefore exempt from the *Employment Standards Act, 2000*, S.O. 2000 c.41 (the "ESA") hours of work, overtime and holiday pay, and guaranteed eating period requirements by virtue of Regulation 285/01 of the ESA.

3. The responding party employees, and the Director of Employment Standards are of the view that the work of the employees did not fall within the statutory meaning of "residential care worker" and that the employees are therefore entitled to the amounts set out in the Order to Pay.

4. Counsel to the applicants advised the Board that should the Board find that the employees of the Viscount and Kuipers residences are not "residential care workers", family members of the residents at Viscount and Kuipers will be seeking intervenor status. If the families are successful in obtaining intervenor status, they will argue that the relevant sections of Regulation 285/01 offend the *Charter of Rights and Freedoms* in restricting the definition of residential care workers so as to exclude those working in group homes in which individuals other than "children or adults with developmental handicaps" reside.

5. Counsel to the applicants asked that the hearing into this matter be bifurcated so that the proposed intervenors' arguments would not be considered unless the Board's rejection of the employers' argument that the Viscount and Kuipers residence make it necessary. Counsel to the Director of Employment Standards agreed to bifurcate the hearing with the caveat that they would retain their right to argue against the proposed intervention of the families of the residents on the basis of remoteness.

6. The employers do not dispute the amounts owing under the Orders to Pay should the Board finds that the employees of Viscount and Kuipers residences are not "residential care workers".

ISSUE

7. Regulation 285/01 of the ESA provides that in order to qualify as a residential care worker, the Board must find that the worker:

> (a) was employed to supervise or care for children or developmentally handicapped persons; and
>
> (b) resided in a family type of residential dwelling or cottage.

There is no dispute that the workers were all employed in a small family type of residence. The only issue is whether the residents of Viscount and Kuipers who suffer from schizophrenia are "developmentally handicapped" persons for the purposes of the ESA.

BACKGROUND

8. Prior to 2003, the Ministry's Employment Standards Policy Interpretation Manual (an internal interpretation manual developed to assist Employment Standards Officers) defined developmental handicapped persons as "those persons who face a mental or physical disability".

9. In 2003, the Board in *Pacaldo* v. *Dolega-Kamienski Estate* [2003] O.L.R.B. Rep. Jan./Feb. 45 (January 24, 2003) had to determine if a caregiver to an elderly person with significant aging related physical and mental disabilities was a "residential care worker". In its decision the Board provided a definition to the term "developmental handicapped".

10. The Board first found that the terms "developmental disability" and "developmental handicap," are interchangeable. The Board made reference to *Dorlands Medical Dictionary* 26th edition which defines a "developmental disability," as a "substantial handicap of indefinite duration with the onset before the age of eighteen years such as mental retardation, autism, cerebral palsy, epilepsy or other neuropathy". The Board also reviewed the term "developmentally disabled" as defined in *Day Nurseries Act* R.S.O. 1990 c. D.2 and *Developmental Services Act* R.S.O. 1990 c. D.12 as "a condition of mental impairment present or occurring during a person's formative years, that is associated with limitations in adaptative behaviour". The Board found that in order for a person to be found to be "developmentally handicapped" "the handicap must have occurred during the person's formative years". The Board found that individuals who suffered from aging related physical and mental disabilities were not "developmentally handicapped," and therefore their caregivers were not residential care workers.

11. In response the Ministry's *Employment Standards Policy Interpretation Manual* was amended to reflect the Board's decision. It now states:

> "Children" are generally considered by the Program to be persons under the age of 18 years. Consistent with the Board's decision in Re Pacaldo and Dolega-Kamienskl,"developmentally handicapped persons" are considered by the Program to be those persons with a condition or handicap that is present or occurs before the age of 18 years. In making its decision, the Board referred to the Day Nurseries Act and the Developmental Services Act, which define the terms "developmentally disabled" as "a condition of mental impairment present or occurring during the person's formative years...", and a definition from an authoritative medical dictionary which defined "developmental disability" as a "substantial handicap of indefinite duration with the onset before the age of 18 years, such as mental retardation, autism, cerebral palsy, epilepsy or other neuropathy", and concluded that "developmentally handicapped" has the same meaning as "developmentally disabled". As a result, where a disability is related to such things as the aging process (e.g. Alzheimer's disease) or an accident, the Program will not consider the person to be developmentally disabled for the purposes of the residential care worker rules and exemptions in ss. 20-23 of Reg. 285/01.

12. The Employment Standards Officer applied the Interpretation Manual definition to determine that the schizophrenic residents of the Viscount and Kuipers residences are not developmentally handicapped, and therefore the employees who work in the residences do not fall within the exemptions for residential care workers.

FACTS

13. The Viscount Residence is an eight bed residence which has been owned and operated by Ms. Lorraine Fraser since December 2004. The Kuipers Residential Homes is licensed for ten residents and has been owned and operated by Ms. Tessa Kuipers for the past 17 years. In addition to the Viscount and Kuipers, both Ms. Fraser and Kuiper each own a larger group home.

14. Both facilities provide their residents with 24-hour care, meals, assistance with medications, recreational opportunities, accompaniment to medical appointments, life skills and assistance where necessary.

15. The Viscount and Kuipers residences are small group homes operating pursuant to the *Homes for Special Care Act*, R.S.O. 1990 c. H 12 licensed and solely funded by the Ministry of Health. According to Madams Fraser and Kuipers, the only source of funding for the homes is through the Ministry of Health, and they are prohibited from charging residents for their services.

16. Ms. Viscount testified that at the time of the claim the Ministry of Health provided a per diem of $40.00 to feed, house and provide care to the residents. The only other available source of revenue from the Ministry is an additional payment of $8.00 per hour and $0.40 per kilometre for mileage to accompany residents to medical appointments. Ms. Kuipers testified that she must pay the individuals who accompany residents to medical appointments $12.00 per hour to ensure reliability.

17. Ms Kuipers testified that the residents who live in group homes are on the continuum of schizophrenia, seriously ill and are unable to maintain their own residence. Ms. Kuipers and Ms. Fraser testified that many of the families of the residents in their facilities report that these individuals had difficulties early on in school and the community, some with police involvement. According to their testimony, the issues which these individuals face were manifested prior to their diagnosis as schizophrenics.

18. Ms. Kuipers testified that she grew up in the same small community as one of the residents in her home and therefore she saw the difficulties he encountered as a child and as a teenager prior to his diagnosis of schizophrenia. Ms. Kuipers testified that this resident had difficulties focusing and with paranoia, which included hiding in ditches.

19. The Viscount currently has 8 residents between the ages of 44 to 53 years of age. The majority of the residents have lived at the home since the Spring/Summer of 2005. Although licenced for 10 beds, the Kuipers residence currently has 7 residents between the ages of 45 and 67, many of whom are long-term residents.

20. Ms. Kuipers testified that there are no minimum staffing requirements, although the Ministry of Health guidelines provide that staffing should be one employee per seven residents. Ms. Kuipers testified that she has one employee per shift. The employee lives at the home and is on duty, twenty-four hours per day Monday through Friday. Most employees work 3 to 5 day shifts.

21. Madams Kuipers and Fraser testified that they would be unable to financially operate their residences if they could not use the "resident worker" exemption under the ESA and would be forced to close their doors. Ms. Fraser testified that the operators who belong to the "Homes for Special

Care Association", with whom she has spoken, utilize the "resident worker" exemption under the ESA.

EXPERT WITNESS

22. Dr. Eva W. C. Chow was recognized on the consent of the parties as an expert witness. Dr. Chow is a lawyer/psychiatrist working at the Centre for Addiction and Mental Health (CAMH) in Clinical Genetic Services doing research on schizophrenia. Dr. Chow's curriculum vitae reflects a long relationship with the CAMH and the University of Toronto, where she is an associate professor. Dr. Chow has received numerous honours and funding for her research on schizophrenia. She has co-authored, published and presented numerous papers, abstracts and book chapters including 39 peer-reviewed papers. Dr. Chow is, amongst other things, an External Reviewer for the American Journal of Psychiatry, the Canadian Academy of Psychiatry and the Law, and External Reviewer, American Journal of Human Genetics (Neuropsychiatric Genetics).

23. Dr. Chow's expertise on the current medical thinking of what causes schizophrenia and when the disease manifests itself is relevant and necessary to determining the extent to which schizophrenia falls within the definition of "developmental disability".

24. Dr. Chow did not interview or review the medical files of the Viscount or Kuipers residents or provide an opinion about individual residents.

What is Schizophrenia

25. Dr. Chow defined schizophrenia by reference to The Diagnostic Statistical Manual of Mental Disorders 4th Ed. ("DSM-IV) the diagnostic tool utilized by the American Psychiatric Association. The DSM IV identifies certain criteria for the diagnosis of schizophrenia which includes:

> a disturbance that lasts for at least 6 months and includes at least 1 month of active phase symptoms (ie two [or more] of the following: delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behaviour, negative symptoms).

26. Schizophrenia is a diagnosis of exclusion as the diagnosis is only made after it is determined that the symptoms are not explained by another disorder such as psychotic depression or acute delirium.

What Causes Schizophrenia

27. There are competing theories regarding the causes of schizophrenia, but according to Dr. Chow most of the medical community accepts that schizophrenia is a disease of the brain which is biologically based with a strong genetic component.

28. Dr. Chow provided testimony on the research into the neurodevelopment model of schizophrenia. Neurodevelopment is the process of growth and maturity of the brain and central nervous system.

29. In 1987, a neurodevelopmental hypothesis of schizophrenia was developed by Weinberger, which arose in part as a result of the images of structural brain changes which are observable at the onset of the disease. Weinberger hypothesized a "lesion" formed perhaps in specific areas of the brain during development and remained static until an "event" occurred during the development of the brain which, influenced by an external factor, triggers the onset of the disease.

30. Support for the neurodevelopmental pathogenesis for schizophrenia has come from clinical observations of premorbid features which may include subtle developmental delays in the first one to two years of life; high arch palate; longer face; changes in adolescents at 13 to 14 years of age, social withdrawal, rebelliousness, different thought patterns which are present long before the diagnosis of the disease.

31. The etiology of schizophrenia is multifactoral. However, according to the research it appears that genetics is the contributing factor in eighty percent of cases of schizophrenia.

32. There is great complexity in the genetics of schizophrenia; there are likely to be several genetic forms and not all gene carriers will develop schizophrenia. However, the risk for developing schizophrenia is greater for biological family members of an individual with schizophrenia. The research has not yet been able to definitely identify all the gene(s) which will determine who develops schizophrenia.

33. A syndromic form of schizophrenia, 22q Deletion Syndrome (22q DS) has been identified which is consistent with a neurodevelopmental hypothesis. The syndrome involves a physical genetic abnormality; a small deletion on chromosome 22q11.2. Neurodevelopmental features of 22qDS are learning disabilities, borderline intellectual abilities, minor and major congenital defects including palatal anomalies and dysmorphic features, brain structure abnormalities. Approximately 25% of individuals with 22q11.2 will develop schizophrenia.

34. The remaining twenty percent of contributing factors to the development of schizophrenia are non-genetic and genetic causes which may include: intrauterine insults, such as poor nutrition or when a mother is confronted with emotional stress during pregnancy; environmental occurrences in early childhood such as a head injury which becomes a causal factor because of a genetic predisposition for the disease; the heavy use of illicit drugs which perhaps because of a genetic predisposition for schizophrenia becomes a contributing factor to its onset and diagnosis.

35. The average age of diagnosis for schizophrenia is 21 years of age for males and 24 to 25 years of age for females. However, according to Dr. Chow many patients are diagnosable between 16 to 18 years of age.

ANALYSIS

36. This is not a simple matter to resolve. The term "developmental handicap" is not defined in the statute. The residential care worker definition in section 1 of Regulation 285 provides:

> "residential care worker" means a person who is employed to supervise and care for children or developmentally handicapped persons in a family-type residential dwelling or cottage and who resides in the dwelling or cottage during work periods, but does not include a foster parent.

Section 23 of the Regulation provides the exemption:

> **23.** Parts VII (Hours of Work and Eating Periods) and VIII (Overtime Pay) and paragraph 4 of subsection 15(1) (record of hours worked) of the Act do not apply to or in respect of a residential care worker.

37. In order for the residential care worker's exemption to apply the first issue to determine is whether the definition of "developmental handicap" adopted by the Board in *Pacaldo* v. *Dolega-Kamienski Estate (supra)* is applicable in these circumstances or whether some other definition is appropriate. The second issue is whether or not the residents of Viscount and Kuipers residences are "developmentally handicapped" for the purposes of the ESA.

I) DEVELOPMENTAL HANDICAPPED DEFINED

38. I have before me two possible competing definitions for "developmental handicapped" under Regulation 285/01 of the ESA. "Developmental handicapped" as it is defined in the *Employment Standards Branch Policy Interpretation Manual* supported by the Board's case law in *Pacaldo* v. *Dolega-Kamienski (supra)* and the broader definitions of "developmental handicapped", as suggested by applicants' counsel.

39. Following the Board's decision in *Pacaldo* v. *Dolega-Kamienski (supra)* the *Employment Standards Branch Policy Interpretation Manual* was amended to define a "developmentally handicapped person" as:

> those persons with a condition or handicap that is present or occurs before the age of 18 years.

40. The employers' counsel urged me not to accept the definition of a "developmental handicap" adopted by the Board in *Pacaldo* v. *Dolega-Kamienski Estate (supra)* because it uses the "arbitrary age" of 18 years as the limit for an individual's formative years.

41. He argues that the answer to the correct definition of a "developmental handicap" cannot be found in a medical dictionary. He argues that there are a number of definitions of "developmental disability/handicap" including the definition found in the American *"Developmental Disabilities Assistance and Bill of Rights Act 2000"*, which provides in part that:

> The term "developmental disability" means a severe, chronic disability of an individual that –
>
> (i) is attributable to a mental or physical impairment or combination of mental and physical impairments;
>
> (ii) is manifested before the individual attains age 22.

Further, he argues that the brain continues to develop until age 25-30 years.

42. I am not persuaded that an American statute, *Developmental Disabilities Assistance and Bill of Rights Act 2000*, is of much assistance to the interpretation of a term used in an Ontario statute.

43. Section 64.1 of the *Legislation Act*, S.O. 2006, c.21 provides that:

> An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

44. This analysis is also in keeping with the commonly understood conventions of "modern statutory interpretation":

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. *Driedger on the Construction of Statutes*, 3rd ed., Sullivan R. ed. (Toronto: Butterworths, 1994), 15 p. 131.

45. *Casino Rama Services Inc.* [2004] O.E.S.A.D. No. 1385 (December 3, 2004) provided that the general legislative purpose for the ESA is to achieve three broad policy objectives.

> (a) It provides a safety net for those with little bargaining power in their employment relationship;
>
> (b) It reflects community standards by seeking to adopt norms established through collective bargaining, human resources practices, public opinion and practices that are common to other comparable jurisdictions;
>
> (c) It attains broader social objectives that might not otherwise occur through other mechanisms (such as collective bargaining).

46. When there are competing interpretations or terms in a statute that limit the rights under the statute, the Supreme Court of Canada discussed in *Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, the manner in which the Act should be interpreted and applied is as follows:

> 36. ... since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour or the claimants.

47. A liberal and generous interpretation of the Act requires any regulation (like section 23 of Ontario Regulation 285/01) that limits the application of the Act or exempts certain individuals from receiving the benefits conferred by the Act to be strictly or narrowly construed. In this case where there is the possibility of competing interpretations found in authoritative medical texts, legislation and amongst medical experts as to when an individual's formative years end, I am of the view I require compelling evidence to interpret the Act in a way which restricts workers' rights to the minimum standard.

48. The applicants rely upon the evidence of Dr. Chow to argue that schizophrenia is by its very nature a developmental handicap because it has a genetic component.

49. Support for the neurodevelopmental hypothesis is found in images of structural brain changes which are observable at the time of diagnosis of schizophrenia and the clinical observations of premorbid features including subtle developmental delays in the first one to two years of life; high arch palate; longer face; changes in adolescents at 13 to 14 years of age, social withdrawal, rebelliousness, and different thought patterns.

50. Certainly Dr. Chow's testimony on the neurodevelopmental hypothesis of schizophrenia is relevant; however, the problem is that it is not sufficiently reliable as the underlying facts have yet to be established. Correlative evidence of premorbid features/ symptoms is not sufficiently reliable proof of causation attributable to schizophrenia and not some independent factor. Adolescent changes including social withdrawal, rebelliousness and different thought patterns are common and may not necessarily be attributable to a later diagnosis of schizophrenia. The evidence of Ms. Kuipers regarding the childhood and adolescent behaviour of one of the residents in her home is not sufficient. There is no medical evidence before me that any of the residents of the Viscount and Kuipers residences suffered the premorbid features of schizophrenia.

51. Accordingly, I am satisfied that using the definition in *Pacaldo* v. *Dolega-Kamienski (supra)* which is captured in the ESA Interpretation Manual of 18 years as the limit for an individual's formative years is appropriate.

II. ARE THE RESIDENTS OF VISCOUNT AND KUIPERS RESIDENCES "DEVELOPMENTALLY HANDICAPPED" FOR THE PURPOSES OF THE ESA

52. There is no medical evidence before me about when individual residents at Kuipers and Viscount residences had the onset of schizophrenia. There is no medical evidence before me that any of the residents at Viscount and Kuipers have been diagnosed with the 22q Deletion Syndrome and have the neurodevelopmental features of 22qDS including the psychiatric (including a diagnosis of schizophrenia), congenital, cognitive and brain structural aspects of the syndrome.

53. The applicants in this case chose to make their case based on an argument that schizophrenia is a "developmental handicap", and therefore employees who care for and reside during work periods with individual who have been diagnosed with schizophrenia in a "family-type residential dwelling or cottage", are "residential care workers", and fall within the exemption from the ESA provided by regulation 285/01.

54. There is no medical evidence before me about when the individual residents of the Viscount and Kuipers residences had the onset of schizophrenia; if and when they suffered the premorbid features of schizophrenia; and/or if any resident has 22q Deletion Syndrome and developed the syndromic form of schizophrenia. I must draw the inference that the medical records do not show an onset of the schizophrenia prior to the age of 18 years, for any resident otherwise it would have been a simple matter to introduce the residents' medical records.

DISPOSITION

55. While I am not unsympathetic to the financial pressures which the applicants find themselves in because of the Ministry of Health funding model in which they are forced to operate,

the purpose of the ESA and its exemptions is not to facilitate the operation of residential homes for schizophrenics; rather, it is to protect the entitlement of workers to basic working conditions.

56. The order to pay is affirmed. I remained seized for any further issues which may arise as a result of this decision.

0640-07-JD The Glebe Centre Incorporated, Applicant v. **The Ontario Nurses' Association**, Responding Party v. Canadian Union of Public Employees, and its Local 3302, Intervenor

Jurisdictional Dispute – The employer sought a declaration that its reassignment of two team leader shifts performed by RNs covered by ONA, to RPNs, covered by CUPE, was appropriate – ONA argued that the reassignment constituted a lay-off of two full time members, contrary to the work protection clause in the collective agreement – No competing claim for jurisdiction arose from the CUPE collective agreement – The employer argued that the collective agreement only protected work done exclusively by the RNs and that since both the RNs and the RPNs acted as team leaders and performed the same functions, a claim for exclusivity could not be made out – The decision turned entirely upon the proper interpretation of the ONA collective agreement – The Board held that while the reassignment gave rise to a jurisdictional dispute in the formal sense, it was inappropriate for the Board to exercise its jurisdiction to confirm the reassignment as it would relieve the employer of its contractual obligation with ONA – The employer was directed to cease assigning team leader work to employees not covered by the terms of ONA's collective agreement.

BEFORE: *Ian Anderson*, Vice-Chair.

APPEARANCES: *Vicky Satta, Jonquille Pak* and *Lorna Mangano* appeared on behalf of the applicant; *Caroline Cohen, Heather McDonell, Gorette Ponte* and *Paula Hickey* appeared on behalf of the responding party; *Nancy Rosenberg* appeared on behalf of the intervenor.

DECISION OF THE BOARD: March 18, 2008

1. This is an application under section 99 of the *Labour Relations Act, 1995*. The Glebe Centre Incorporated seeks a declaration that its reassignment of two "Team Leader" shifts from registered nurses (RNs), covered by a collective agreement with the Ontario Nurses Association, to registered practical nurses (RPNs) covered by a collective agreement it has with the Canadian Union of Public Employees, is appropriate. ONA takes the position that the reassignment has resulted in the lay-off of two full time members of its bargaining unit and that to this extent it is contrary to its collective agreement with The Glebe Centre, and is inappropriate.

2. The Glebe Centre is a non-profit, community based organization offering accommodation, care, home support services, and a recreational and social centre for seniors in the Ottawa area. It has approximately two hundred and fifty four licensed long term care beds, divided into eight residential home areas (RHAs). Each RHA has a Team Leader during the day and evening shifts. During the

night, two Team Leaders cover all eight RHAs. All the RNs and RPNs are employed as Team Leaders and all of the Team Leaders are either RNs or RPNs.

3. The Team Leader function was created in 1997. ONA asserts that up until four years prior to the date of this application, all the Team Leaders except one were RNs. The Glebe Centre asserts that both RNs and RPNs have been performing the Team Leader function since 1997.

4. Prior to February 20, 2007 the day and evening shifts were divided equally between RNs and RPNs. The regularly scheduled staffing pattern was as follows:

Days (7am to 3 pm)	4RNs 4RPNs
Evenings (3pm to 11 pm)	4RNs 4RPNs
Nights	2RNs 0RPNs

Effective February 20, 2007, this was changed to the following:

Days (7am to 3 pm)	3RNs 5RPNs
Evenings (3pm to 11 pm)	3RNs 5RPNs
Nights	2RNs 0RPNs

5. The effect of the change in the staffing position was the elimination of two full time and two part time RN positions. Two full time RNs were laid off as a result: no part time RNs were laid off since there were two vacant part time RN positions at the time. There were corresponding increases in RPN positions. ONA disputes only the elimination of the two full time RN positions: it does not challenge the elimination of the two part time RN positions since none of its bargaining unit members had their hours reduced or were laid off as a result.

6. ONA relies upon Article 15.01 of its collective agreement with The Glebe Centre, which provides:

> Employees, not covered by the terms of this agreement, will not perform duties normally assigned to those covered by this Agreement if the direct result is the termination, lay-off or reduction of hours of a bargaining unit nurse.

ONA takes the position that the duties in question were normally assigned to RNs, that the duties are now being performed by RPNs, who are employees not covered by its collective agreement, and that the direct result of this is that two full time RNs were laid off. This, it says, constitutes a violation of the collective agreement. It filed a grievance to that effect which was referred to arbitrator Chodos

for hearing. The Glebe Centre responded to the grievance by filing this jurisdictional dispute application.

7. The Glebe Centre requested arbitrator Chodos defer his consideration of the grievance pending the outcome of this application. ONA resisted this request. CUPE did not attend before arbitrator Chodos. Arbitrator Chodos noted that CUPE, as was its right, had declined to attorn to his jurisdiction. He was of the view that it would be irresponsible to ignore the impact of any award that he might make on CUPE's rights under its collective agreement and that there was a "practical common-sense compulsion" to having all of the parties before one tribunal to obtain a ruling on the issue. Accordingly, he adjourned the proceedings before himself *sine die*.

8. In the proceedings before this Board, The Glebe Centre rejects the proposition that it has breached the ONA collective agreement. It argues that the work protection clause in the ONA collective agreement only protects work if exclusively done by RNs. Since both RNs and RPNs act as Team Leaders, and in doing so perform all, or virtually all, of the same functions, the claim for exclusivity cannot be made out. In such circumstances, it argues, it can reassign the work provided that it is done for bona fide business reasons. In this case, it argues the change in the staffing pattern was done for legitimate budgetary reasons. In any event, it argues, consideration of factors that have been considered in jurisdictional disputes in the health care sector (employer preference, collective bargaining relationships, economy and efficiency, impact on the residents, skills and training, health and safety and industry standards) results in confirmation of its reassignment of the work.

9. ONA, as noted takes the position that the reassignment of the work constitutes a breach of its collective agreement. It states that the collective bargaining relationship between the parties should be conclusive of this case. In any event it disputes that economy and efficiency, impact on the residents, skills and training, health and safety and industry standards support the employer's reassignment of the work.

10. In its intervention, CUPE stated simply that it did "not object to [The Glebe Centre's] application concerning the work assignment". At the consultation, however, CUPE stated that it agreed with ONA that the collective agreement language should take precedence. It has a similar, but not identical, clause in its collective agreement with The Glebe Centre.

Analysis

11. All parties focused on the meaning to be given to the work protection clause in the ONA collective agreement. The parties agree that there have historically been two lines of arbitral jurisprudence interpreting such clauses. The first lines of jurisprudence, relied upon by The Glebe Centre, holds that work protection clauses only protect work duties of employees where those duties are exclusively performed by members of the bargaining unit: *London and District Service Workers' Union, Local 220* [1999] O.L.A.A. No. 758 (Hunter); *Meadow Park Nursing Home,* [1999] O.L.A.A. No. 672 (Williamson); *Hospital for Sick Children,* (1993) 38 L.A.C. (4th) 368 (Mitchnick); *Manitoulin Lodge*, (1990) 18 C.L.A.S. 160 (Craven); *Fairhaven Home for Senior Citizens* (1992) 28 L.A.C. (4th) 399 (Thorne); *Kincardine and District General Hospital,* (1994) 36 C.L.A.S. 339 (Verity); and *Windsor Regional Hospital,* (2000) 62 C.L.A.S. 313 (Williamson). The second line of jurisprudence, relied upon by ONA and adopted by CUPE, holds that work protection clauses protect the type and volume of the work performed by members of the bargaining unit: *Ottawa Hospital*, [1999] O.L.A.A. No. 1019 (Kates); *Northumberland Health Care Corp,* (2003) 75 C.L.A.S. 393, (Verity); *Versa Care*,

[1997] C.L.A.S.J. 425247 (Harris); *St. Joseph's General Hospital*, [1999] O.L.A.A. No. 782, (Haefling); *Knollcrest Lodge*, (1996) 42 C.L.A.S. 383, (Carrier); *Rideaucrest Home*, (1995) 48 L.A.C. (4th) 1 (H.D. Brown); *Beacon Hill Lodges*, [1987] C.L.A.S.J. 462107, (H.D. Brown); *Cambridge County Manor*, unreported, July 8, 1991 (Samuels); *South Centennial Manor*, unreported, May 10, 1984 (H.D. Brown); and *Extendicare (Laurier Manor)*, (1997) 48 C.L.A.S. 346 (Mitchnick).

12. The existing case law was exhaustively reviewed by arbitrator Mitchnick in *Extendicare* (1997). He concluded that a distinction must be made between cases in which there is no language in the collective agreement governing the reassignment in work and cases in which there is language in the collective agreement. The analysis in the former type of cases is of little assistance in interpreting collective agreements in which there is some form of work protection clause (see paragraph 7). Mr. Mitchnick concluded that a further distinction may be made between cases in which the work protection clause was unqualified and those in which it was not. With respect to unqualified clauses, Mr. Mitchnick observed (at paragraph 9):

> [S]ubject to any limited exceptions stated, these clauses at least on strict reading do not permit the employer any latitude in re-assigning bargaining-unit work outside the unit – even in the course of a shift, where no existing member of the bargaining unit is impacted in his/her employment or level of hours. What the cases show in these traditional "overlap" situations, however, involving R.N.'s and R.N.A.'s (now R.P.N.s) in the health-care sector, is that arbitrators have in practice been reluctant to put that fine a point on it. .... Indeed, arbitrators have often looked to the "Practice" of the parties to inform themselves as to the tolerances that should be teased out of such otherwise unqualifiedly restrictive language, and in some cases, perhaps intuitively, may actually be writing in a threshold of "no [significantly adverse impact] or lay-off". In all cases, in any event, the term typically used in the clause, be it "presently" or "normally", opens the door to past practice and arbitrators appear happy to be guided by any information or lessons that the parties' own past practice may impart.
>
> [Emphasis in original.]

13. By contrast, arbitrator Mitchnick concluded (at paragraph 16) "there would appear to be nothing in that overall arbitral tendency that would support the elimination of the express words "shall not result in the termination, lay off or reduction of hours of any member of the bargaining unit" ... (and *Kincardine Hospital* may simply fail to reflect that)." Notably, the work protection clause which ONA seeks to rely upon in this case is qualified in that manner.

14. All of the cases relied upon by The Glebe Centre that predate 1997 were included in arbitrator Mitchnick's review of the cases. All of them, with the possible exception of arbitrator Verity's 1994 decision in *Kincardine Hospital* to which I will return below, fell into the category of cases which considered "unqualified clauses". Notably, this included arbitrator Mitchnick's own prior decision in 1993 in *Hospital for Sick Children*.

15. I accept arbitrator Mitchnick's 1997 review of the arbitral jurisprudence as being accurate.

16. Another approach to analyzing the arbitral case law has been suggested by, among others, arbitrators Harris in *Versa Care* and Kates in *Ottawa Hospital*. This approach does not seek to reconcile the case law, but rather argues that the cases can be grouped into those which have taken a

plain reading approach to work protection clauses and those which have not. To frame the matter in this way is to foreshadow the result, since it is the role of arbitrators to interpret the collective agreement. As stated by arbitrator Kates in *Ottawa Hospital* :

> 11. There exits [sic], of course, public policy considerations as to why arbitrators who are disposed to sustaining the overlap defence do so. Whether the reassignment outside the bargaining unit in the face of a work protection clause is to the more skilled classification (i.e., higher paid) or the less skilled classification (lower paid) as the case may be, the employer has usually been beset by a circumstance beyond its own control that precipitated the change in assignment. And so long as the assumption is made that the third party, namely the patient and/or the resident will be property [sic] served, whether by the maintenance of an enhanced service or by the same service, the general disposition of these arbitral awards is to favour not so much the employer's actions, but to bolster for obvious reasons the maintenance of the service rendered its beneficiaries. In other words, the employer, so long as it is acting in good faith and for a proper business purpose, is extended the latitude or the prerogative under the management lights [sic] clause to override a clause of the collective agreement specifically designed to forestall this very activity from occurring (see Re: *Hospital for Sick Children and CUPE, Local 2816* (1993), 38 L.A.C. 368 (Mitchnick)).
>
> 12. The more recent arbitral cases, in my view, have attempted not so much to undermine this line of reasoning but to expose its deleterious impact on the application of the work protection clause. As suggested by Arbitrator Brown in Re: *Rideaucrest Home for the Aged and ONA* (1995), 48 L.A.C. (4th) 1, we, as arbitrators are not in the public policy making arena. We are not authorized "to read down" or "read out" or otherwise alleviate a party from the application of viable contractual obligations assigned under the collective agreement where circumstances dictate their appropriateness. However, wide and flexible the employer's discretion under the management rights clause where encumbered by a precise and specific clause as is the situation herein, we are duty bound to apply it. We cannot "read down" a clause, [sic] of the collective agreement or infer a condition such as "exclusive" in the context of the protection of bargaining unit work where that term is nonexistent. We cannot thereby "add" an exception to the application of the work protection clause where none was intended or to do [sic] so with a view to lending an appearance of harmonization between two job classifications where no incompatibility has been demonstrated.

17. As noted, the one possible exception to arbitrator Mitchnick's 1997 analysis was arbitrator Verity's 1994 decision in *Kincardine Hospital*. In 2003, arbitrator Verity had occasion to address the issue of work protection clauses again in his decision in *Northumberland Health Care*. At paragraph 52 of that decision arbitrator Verity accepted Mr. Mitchnick's 1997 review of the arbitral jurisprudence as being accurate. I take this to mean that he accepted Mr. Mitchnick's comments with respect to *Kincardine Hosptial*. Arbitrator Verity, however, went further than that. The clause before him in *Northumberland Health Care* was, as he stated, an "unqualified" work protection provision, i.e. the type of clause that Mr. Mitchnick observed had been written down by arbitrators, through reference to past practice of the parties or otherwise. Nonetheless, Mr. Verity expressly adopted the approach taken by arbitrator Kates in *Ottawa Hospital* (in interpreting the same clause), and held that there was no reason to ignore the plain meaning of the words and not give the provision its literal meaning (see paragraph 57).

18. The remaining arbitral authorities relied upon by The Glebe Centre are arbitrator Williamson's 1999 decision in *Meadow Park Nursing Home* and 2000 decision in *Windsor Regional Hospital* and arbitrator Hunter's 1999 decision in *London Health Sciences Centre*. In *Meadow Park Nursing Home* and *London Health Sciences Centre* the union sought to rely upon an "unqualified" work protection clause. In *Windsor Regional Hospital* there was no work protection clause. In each of these cases the arbitrator applied Mr. Mitchnick's 1993 decision in *Hospital of Sick Children* but made no reference to Mr. Mitchnick's 1997 decision in *Extendicare*, or to the "plain meaning" approach described by Harris, Kates and others. For these reasons, I do not find these decisions to be of assistance.

19. I am satisfied, therefore, that on either the basis of the distinction outlined by Mr. Mitchnick in 1997 or the plain meaning approach the work protection clause contained in the ONA collective agreement precluded the reassignment of the Team Leader shifts to RPNs to the extent that this resulted in the lay-off of the two full time RNs, notwithstanding the fact that RNs did not exclusively perform the Team Leader duties.

20. The issue for me, however, is not whether the reassignment constituted a breach of the collective agreement, but whether the assignment was appropriate for the purposes of section 99 of the *Labour Relations Act, 1995*. The Glebe Community Centre asserts that the assignment is appropriate and relies upon the following cases in support: *Stevenson Memorial Hospital*, [2003] O.L.R.D. No. 1125 (April 3, 2003) (OLRB); *Trenton Memorial Hospital*, [1996] OLRB Rep. Sept./Oct. 897; *Ross Memorial Hospital*, [2002] O.L.R.D. 2029 (June 21, 2002) (OLRB); *Sudbury & District Health Unit*, [1996] OLRB Rep. Jan. 28 (OLRB); and *Network North*, [1996] O.L.R.D. 2979 (OLRB). ONA argues that the assignment is not appropriate and relies in addition upon *Pioneer Manor – Home for the Aged*, [1993] OLRB Rep. May 447.

21. In *Stevenson Memorial Hospital*, a decision of Vice Chair McLean, the employer moved four hospital beds from the obstetrics unit to the long term care unit. While in the obstetrics unit, the four beds had been exclusively or mostly assigned to RNs represented by ONA. Work in the long term care unit had been assigned to RPNs, represented by OPSEU, and to RNs. The reassignment of the four beds to the long term care unit did not result in a reduction in the number of either RNs or RPNs, rather it resulted in the assignment of an additional RN to the long term care unit. OPSEU claimed the new position, relying in part upon an unqualified work protection clause it had in its collective agreement, which gave rise to a jurisdictional dispute application to the Board.

22. Vice Chair McLean noted that there were competing lines of arbitral jurisprudence with respect to the interpretation of work protection clauses. He adopted the reasoning of the cases which have held that such clauses only afford protection with respect to work exclusively performed by members of a bargaining unit. There is no indication in the decision, however, that Vice Chair McLean was made aware of Mr. Mitchnick's 1997 decision in *Extendicare*, or to the "plain meaning" approach described by Harris, Kates and others. Further, since there was no loss of work by any member of the OPSEU bargaining unit, the work protection clause was not engaged in any event.

23. This interpretation of *Stevenson Memorial Hospital* was confirmed by Vice Chair McLean sitting as an arbitrator in *Credit Valley Hospital*, June 9, 2007, unreported. (I note that this case was provided to the parties for comment by the Board during the consultation with respect to this matter.) In that decision, arbitrator McLean referred to Mr. Mitchnick's 1997 decision, Mr. Kates *Ottawa Hospital* decision and Mr. Verity's 2003 decision, and concluded that the plain meaning approach to

work protection clauses advocated by the union in the case before him should prevail over the exclusivity approach argued by the employer. At page 18 of that decision, arbitrator McLean stated:

> ... I am satisfied that at one time the Hospital's approach may have been the predominant (although not universal) view, but since 1997 the tide has switched to a large degree. Arbitrators, properly provided with all of the caselaw, have, since 1997, found that the Union's interpretation is the correct one. While the sample size is small, I find this persuasive particularly since the trend aligns with my understanding of the provision.

Accordingly, I do not find *Stevenson Memorial Hospital* to be of assistance.

24. I also do not find *Ross Memorial Hospital* to be of assistance. The decision is essentially a bottom line decision, consisting of five short paragraphs. It is not possible for individuals who were not parties to that litigation to determine the basis on which the Board reached its decision.

25. In *Network North* the dispute related to a newly created position. The Board adopted the "composite crew" approach with respect to the assignment of the new work. I do not find this case to be of assistance. There was no reference to any work protection language of the sort under consideration in this case, presumably because it was not relevant. Such language places restrictions on an employer's ability to remove existing work from a bargaining unit: it does not compel the employer to assign new work to one bargaining unit over another which also performs the work.

26. In *Trenton Memorial Hospital* the Board affirmed the reassignment of certain work from one bargaining unit to another through the application of some of the factors traditionally applied to jurisdictional disputes. In doing so, however, the Board "placed considerable significance" on the fact that there was "no contractual prohibition to the transfer of work previously performed by members of the OPSEU bargaining unit to other employees of the Hospital" (see paragraph 17). In this case, by contrast, I have found that there is such a contractual prohibition.

27. This is consistent with the Board's approach in *Pioneer Manor – Home for the Aged.* In that case ONA complained about the reassignment of work from its members to other employees. ONA's collective agreement contained an unqualified work protection clause. The Board referred to and followed several of the early arbitral cases which held that such clauses protect the volume and type of work: no reference was made to the competing cases holding that such protection is afforded only if the work is done exclusively by members of the bargaining unit, although on the facts of the case before it, the Board found that the work had previously been done exclusively by ONA members. The Board considered the various criteria traditionally applied to jurisdictional disputes in the construction industry. It held (at paragraph 28), however, that:

> [A]lthough the criteria of economy, efficiency, and employer preference provide some support for the position advocated [by] the Employer and supported by CUPE, the criteria of collective bargaining relationships and Employer past practice strongly favour the position asserted by ONA and combine to outweigh those other criteria in the circumstances of this case.

28. Finally, in *Sudbury & District Health Unit*, ONA represented a bargaining unit of nurses and graduate nurses. Its collective agreement contained a work protection clause which provided:

> Employees outside the scope of the bargaining unit will not perform the work normally performed by members of the bargaining unit except for instruction, research, during an emergency or in other cases as are mutually agreed to by the parties.

The Association of Allied Health Professionals: Ontario (AAHP: O) represented a bargaining unit of paramedical employees. There is no reference to any work protection clause which may have been in its collective agreement.

29. The dispute was with respect to the assignment of work in the classification "Genetic Counselor". For 15 years following its creation, the position had been filled by a nurse. The employer hired a non-nurse to fill a vacancy and assigned her to the AAHP: O bargaining unit. The employer asserted that it should be free to hire the most appropriate candidate for the position, whether an RN or not, with the individual hired being assigned to ONA bargaining or the AAHP: O bargaining unit depending on whether or not they were in fact an RN (sometimes referred to as a "composite crew basis").

30. The Board followed *Pioneer Manor – Home for the Aged* in concluding that the assignment of the work violated the work protection clause of the ONA collective agreement. The Board went on to comment that other factors strongly supported the reasonableness of the employer's approach. In particular, it accepted that the employer's motivation for hiring a non-nurse to fill the position was the desire to offer a multi-disciplinary approach in the provision of the service, not to phase out the employment of nurses as genetic counselors. The Board continued (paragraph 33):

> Despite the entirely sensible attempt by the employer to improve the design of its health care program, neither the employer nor the Board can ignore the distinctive obligation borne by the employer under the ONA collective agreement. .... This is not a case where the competing trade unions rely on equal collective agreement rights to the work in dispute, as is typical in construction industry cases. Here, ONA bargained for protection from jurisdictional disputes and the AAHP:O did not.

31. The Glebe Centre relies on the next paragraph, in which the Board stated:

> Although we conclude that the factors of collective bargaining relationships and past practice are determinative of this dispute, we do not mean to suggest that the Board's approach to jurisdictional disputes in the health care sector should mirror the approach taken in the construction industry cases. .... [T]he health care sector differs significantly from the construction industry because of the prevalence of mandatory interest arbitration. Although the factor of collective bargaining weighs heavily in the instant case, where one trade union has bargained for protection from jurisdictional disputes and the other has not, it may not be the prevailing factor in every health care sector dispute.

With respect, I do not see how this paragraph assists The Glebe Centre. In this case ONA has bargained for protection from jurisdictional disputes when the reassignment of the work would result in the reduction of hours or the lay off of one of its members. That is precisely what happened here. The fact that CUPE bargained for similar protection is irrelevant as there is no inconsistency between

its clause and the application of the clause in the ONA collective agreement in the circumstances of this case.

32. Nor do I attach much significance to the fact that collective agreements in the health care sector are typically subject to mandatory interest arbitration. If an employer considers the work protection language in its collective agreement to be unduly constraining, arguments of economy and efficiency, impact on the residents, skills and training, health and safety and industry standards can be advanced by the employer at the bargaining table and through the interest arbitration process in order to obtain change. As stated in *Pioneer Manor – Home for the Aged* at paragraph 25:

> In our view, interest arbitration is an appropriate forum in which to at least initially seek such a change, as an interest arbitrator if persuaded that such revision is warranted, will be in a position to make such an adjustment in the context of the total balance of the interest award. Thus, if ONA loses an element of its existing job protection in that manner, it will likely achieve some gains in other areas to offset that loss. It is highly doubtful that this Board would be in a position to adopt a similar approach. Thus, for the Board to grant the Employer's request would be to deprive ONA, without compensation, of an important element of job security which was undoubtedly gained at some expense to other interests through the interest arbitration process.

33. In both *Pioneer Manor – Home for the Aged* and *Sudbury & District Health Unit* the Board suggested that it was engaged in an exercise of weighing a variety of factors relevant to jurisdictional disputes. In fact, in both cases the collective bargaining relationship, that is the breach of one union's collective agreement with no countervailing claim from another union's collective agreement, was the determining factor. I am unable to see how any combination of other factors could give rise to a different result. Those factors assist the Board in determining how to allocate work in the face of competing claims for jurisdiction arising from different unions' collective agreements. They do not provide a means for an employer to unilaterally avoid its obligations under a collective agreement in the absence of some basis for such competing claims.

34. For clarity, I do not wish to be understood as suggesting that a work protection clause can never give rise to competing claims for jurisdiction. It is possible, for example, that if two unions both had unqualified work protection clauses, a plain meaning interpretation of their respective clauses could give rise to competing claims with respect to the assignment of work. The resolution of such a dispute might require consideration of other factors. That is not, however, this case.

35. It will be observed, that as I have concluded no consideration should be given to other factors, my decision turns entirely upon the proper interpretation of the ONA collective agreement. The Board has frequently deferred its consideration of jurisdictional disputes pending a determination of such questions by an arbitrator. Given the history of this matter, however, in my view it is appropriate to determine the issue raised by the parties without further delay.

36. In this case, ONA seeks to rely on a work protection clause which it has negotiated with The Glebe Centre. No competing claim for jurisdiction arises from the CUPE collective agreement, other than as a result of the reassignment of the work to the RPNs in breach of ONA's collective agreement. While this reassignment gives rise to a jurisdictional dispute within the meaning of the Act in a formal sense, it would be completely inappropriate for the Board to exercise its jurisdiction

to confirm that reassignment. To do so would be to relieve The Glebe Centre of its contractual obligation with ONA by reference to factors which, in the absence of a competing claim arising independently of the breach, are properly raised during negotiation of the next collective agreement. I decline to give any consideration to those factors because to do so would undermine the collective agreement which the parties have entered into and their collective bargaining relationship.

37. Accordingly, The Glebe Centre is directed to cease assigning Team Leader work to employees not covered by the terms of ONA's collective agreement, if the direct result is the termination, lay-off or reduction of hours of a bargaining unit nurse.

38. This matter is remitted to the Manager of Field Services to arrange a meeting to attempt to address any remedial issues arising from this award. I remain seized in the event the parties are unable to resolve any such issues.

1639-07-G International Brotherhood of Electrical Workers, Local 894, Applicant v. **PBW High Voltage Ltd.**, Responding Party v. International Brotherhood of Electrical Workers, Local 353, Intervenor No. 1 v. Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, Intervenor No. 2

Construction Industry Grievance – Intervenor – Parties – Practice and Procedure – Local 804 sought remedies against the contractor for violating the mobility provisions of the provincial agreement when it employed members of Local 353 to connect and install high voltage cables and transformers at a warehouse project in the geographic jurisdiction of Local 804 – Local 353 sought to intervene – The Board found that while the potential displacement of Local 353's members may not be enough to establish a legal interest in the proceeding, the interpretation of section 17 of the ICI portion of the Principal Agreement, by which Locals 353 and 1687 act as a "clearing house" for line work do[illegible] the province of Ontario, does create that legal interest – Objection (to Local 353 participa[illegible]) dismissed – Matter continues

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *John Tomlinson* and *Richard Baxter*.

APPEARANCES: *Lorne A. Richmond, J. Gillett, G. Kilroy, D. Daniels* and *J. Dowding* for the applicant; *Scott G. Thompson, Michael Penny* and *Michael Lettner* for the responding party; *Michael A. Church* and *Bill Finnerty* for Intervenor No. 1; *Scott G. Thompson* and *Eryl Roberts* for Intervenor No. 2.

DECISION OF THE BOARD; April 21, 2008

1. The applicant objects to Intervenor No. 1 ("Local 353") participating as a party in this referral of a grievance to the Board for determination under section 133 of the *Labour Relations Act, 1995*, S. O. 1995, c. 1 as am. (the "Act"). It submits Local 353, while having an interest in seeing the grievance filed by the applicant dismissed so members of Local 353 can continue performing work within the geographic jurisdiction of the applicant, does not have a legal interest in this grievance proceeding.

2. The work giving rise to this grievance is related to the installation of high voltage electrical cables and transformers at the Loblaws warehouse project in Durham Region that is within the geographic jurisdiction of the applicant. The responding party was involved with installation and connection of a step down transformer station receiving 44 KV of electric power directly from the public utility (the "First Transformer") and the installation and connection of four other step down transformers (the "Secondary Transformers") that receive 13.5 KV of electric power from the First Transformer. The First Transformer converts 44 KV of electric power to 13.5 KV of electric power. The Secondary Transformers connected to the First Transformer convert 13.5 KV of electric power to 600 volts of electric power for commercial use in the warehouse. The First Transformer and the four Secondary Transformers are all located within the property line of the Loblaws warehouse, with three of the four Secondary Transformers located on the mezzanine level of the warehouse building. The First Transformer and one Secondary Transformer are not housed in a building but are on concrete pads outside the buildings.

3. The applicant alleges the responding party contravened the mobility provisions of the provincial collective agreement between the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario and the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario (the "Principal Agreement") and in particular sections 7 and 17 of the "ICI Portion" of the Principal Agreement when it did not hire members of the applicant to perform some of the work associated with the connection and termination of the high voltage cables from the First Transformer to the Secondary Transformers and any work for which the responding party was responsible in respect of connecting and running cable from the Secondary Transformers to the electrical panels in the buildings. (The parties explained the Principal Agreement contains several discrete segments: the "blue pages" are applicable to work performed in the industrial, commercial and institutional ("ICI") sector of the construction industry and are the ICI Portion of the Principal Agreement while the "yellow pages", referred to as the "Provincial Linework Agreement", are applicable to work done outside the ICI sector. There are two other segments of the Principal Agreement to which the parties did not refer and appear to be not relevant to this matter.) The applicant did not assert a contravention of the Principal Agreement in relation to the work associated with the connection of the First Transformer to the public utility's 44 KV power line.

4. The applicant points out its grievance does not seek a remedy against Local 353 but rather is directed at the responding party because it did not comply with the hiring obligations set out in the ICI Portion of the Principal Agreement when it carried on work within the geographic jurisdiction of the applicant. The applicant refers to the distinction between "inside work" and "outside work" in section 2 of the ICI Portion of the Principal Agreement and submits that the responding party had improperly employed its high voltage line crew to do "inside work" which, according to the applicant, should have been performed by electricians rather than members of the responding party's line crew.

5. The responding party is a high voltage line contractor with specialized crews who work with high voltage power lines, that is power lines carrying electric current 750 volts or higher. The responding party suggested that high voltage electrical work is carried out by specialty high voltage contractors that are subcontracted by the project owner, general contractor or electrical subcontractor to perform the necessary splicing, terminating and connecting of high voltage cables running from a public utility's high voltage line to transformers that step down the voltage to a level used for normal industrial and commercial purposes. It submitted the termination, connection and splicing of high voltage cables requires specific skills and training, and that the consequences of such work being

done improperly can be catastrophic, leading to transformer explosions and fires resulting in buildings being damaged or destroyed and people being severely injured, burned or killed.

6. The applicant acknowledged that if the work done by the responding party at the Loblaws warehouse project came within the scope of the Provincial Linework Agreement segment of the Principal Agreement, as asserted by the responding party, its grievance would be dismissed. The responding party asserts its work at the Loblaws warehouse project was not within the ICI sector and the Provincial Linework Agreement segment of the Principal Agreement covered the work that is the subject of the grievance. It also submits, in any event, even if sections 7 and 17 of the ICI Portion of the Principal Agreement applied to the work at the Loblaws warehouse project, its assignment of that work to its line crew did not contravene the Principal Agreement.

7. The applicant submits Local 353 is in the same position as a subcontractor that received a subcontract contrary to a collective agreement by which the general contractor was bound or the union representing the employees of that subcontractor. The outcome of the dispute between that general contractor and the union party to that collective agreement might well result in the cancellation of that subcontract and the subcontractor's employees losing work. In that kind of a case the Board has consistently held that neither the subcontractor nor the union representing the employees of that subcontractor have a legal interest in the proceeding arising from a grievance alleging the general contractor violated its collective agreement. The principle relied on by the applicant was succinctly set out in *Ontario Power Generation Inc.*, [2002] ORLB Nov./Dec. 1139 at 1140-41:

> A grievance is a private dispute resolution mechanism between two parties, designed to resolve disputes arising out of the collective agreement between them. The dispute, like the collective agreement, is a matter between two parties and no one else. That is not to say that others will not likely be keenly interested in the outcome of the dispute, and desire to lead evidence and make submissions to the Board as to what the outcome should be. The Board has long distinguished between those parties with a "direct and legal interest" in the dispute and those with a "commercial or incidental interest". It has classified as "commercial and incidental" the types of interests asserted by those who might find a source of future work denied to them if a collective agreement is interpreted in the manner which the grieving union seeks (e.g. *Napev Construction Ltd.*, [1979] OLRB Rep. Sept. 886 and [1980] OLRB Rep. Jan. 74; *Municipality of Metropolitan Toronto*, [1986] OLRB Rep. Apr. 574). Similarly, the Board has denied status to parties who assert that they are bound to the same or similar contractual language that the Board is going to interpret, and wish to be present to argue the meaning of those contractual provisions when they are adjudicated for the first time (see *Canadian Elevator Manufacturers Association*, [1976] OLRB Rep. Dec. 816). In cases where the grievance is an allegation that work ought to have been performed by members of the grieving union, and not to members of a different union who in fact perform the work, the Board has consistently required one of the parties to that jurisdictional dispute (which, as between the two unions, is not likely to be a contractual dispute) through the jurisdictional dispute provisions of section 99, and has refused to deal with the dispute in the course of a grievance arbitration (see *E.S. Fox Limited*, [1992] OLRB Rep. Apr. 431).

The applicant claims the interest of Local 353 is in the nature of a "commercial or incidental" interest since it "might find a source of future work denied to" its members "if [the] collective agreement is interpreted in the manner which the grieving union seeks". See also *The Plan Group Inc.*, [2003] OLRB Rep. Jan./Feb. 123 (February 25, 2003) in which the Board denied standing to one local union bound by the Principal Agreement to participate in a grievance referral in which the grievance alleged the employer had violated the "travel time" provisions of another local union's local appendix to the Principal Agreement.

8. The applicant also relied on *Jaddco E. Anderson Ltd.*, [1990] OLRB Rep. May 570 in which the Board refused to grant standing to two of the five constituent employer associations of the designated Labourers Employer Bargaining Agency in a grievance referral that raised the issue of which appendix in the Labourers Provincial Agreement (the Masonry Tender Appendix or the Local Union Appendix) applied to the work performed by the general contractor named in the grievance. The Board held that neither of the constituent employer associations were parties to the Provincial Agreement as they were not one of the entities referred to in what is now section 163(3) of the Act. The Board also concluded they did not have a legal interest in the issue when it wrote at page 573:

> Their exclusive jurisdiction to negotiate with the employee bargaining agency, in the case of the Appendix, and with its affiliated bargaining agents in the case of the local union schedules, comes from the constitution of the employer bargaining agency, not from the Agreement. An interpretation of the Agreement, therefore, cannot affect their bargaining jurisdiction. In the Board's opinion, the assertion that the grievance raises a conflict about which of two different sets of conditions should apply to the construction labourers performing the work at issue, or that its claim strikes at the structure of the Agreement does not entitle either of the two organizations to be a party to the application. The employer bargaining agency which is the "employer" party to the Agreement, was given notice of the application, is entitled to participate and could have appeared to defend the structure of the Agreement. For whatever reason it chose not to and has not delegated either the OMCA or the OGCA to act for it. Therefore, in the Board's view, the grounds advanced by the OGCA do not establish an entitlement independent of the employer bargaining agency of which it is a part to be a party to these proceedings. To the extent that those same grounds could apply to the OMCA, the result is the same as for the OGCA.

The applicant argues that a local union is in the same position as a constituent member of a designated employer bargaining agency seeking to intervene in a section 133 referral. Neither of them has standing to participate.

9. Local 353 and the responding party contend that almost all of the persons who perform linework under the Principal Agreement are either members of Local 353 or International Brotherhood of Electrical Workers, Local 1687 ("Local 1687"). They point to section 1704 of the ICI Portion of the Principal Agreement that they say establishes the role of both Local 1687 and Local 353 as being the "hiring hall" through which the people who do linework under the Principal Agreement are dispatched. Section 1704 provides, in part:

> ...for the purpose of Section 17, when a Contractor obtains work outside of his home area, Local Union No. 353 and 1687 shall act as a clearing house for the Province of Ontario by coordinating manpower requirements and

> making workmen available to Contractors for the whole Province. Any work performed under this Agreement by members of L.U. 353 or 1687 outside of their home locals will be cleared by these Locals prior to any crew movement.
>
> It is agreed that should a Contractor obtain work in an area outside of his home area, he shall be permitted to bring his own crews comprised of Linemen, Splicers and other specialists and hire any additional men required through the Union. The Contractor agrees to notify the Local in whose jurisdiction he has obtained the work of the names and classifications of the men he is bringing into the area prior to any crew movement.

The applicant did not challenge the assertion that almost all of the linework done under the Principal Agreement is carried out by members of Local 353 in Southern Ontario and by members of Local 1687 in Northern Ontario, but submits that fact is irrelevant to the issue of standing.

10. Local 353 also refers to the sector issue raised by the responding party and submits that once a sector issue is raised in the proceeding, any union that represents employees working on the project that is the subject of the sector determination has standing to participate.

11. The applicant submits the sector issue raised by the responding party is patently unmeritorious. The Loblaws warehouse project is, in the applicant's submission, obviously construction work in the ICI sector. The applicant referred to *C.S.B.I. Contracting Ltd.*, [2003] OLRB Rep. Sept./Oct. 737 (October 20, 2003) where the Board clearly held a sector determination is made by reference to the construction project where is being done or will be done. The Board at page 742-43 wrote:

> 14. ...the sector determination must relate to the work performed or that is to be performed. The work performed or to be performed is defined by the construction project giving rise to the sector issue and therefore the Board is required to assess the work done or to be done on that project. The work that had been done years earlier in the same location, and on the same structure, but as a different and completely separate project would, in my opinion, be of little, if any, relevance to the sector issue.
>
> 15. In any event, while the Board will generally treat a construction project as a whole for purposes of a sector determination (see *City of Sault Ste. Marie, supra* at page 879; *West York Construction Ltd.*, [1983] OLRB Rep. Dec. 2132 at 2141), a large scale construction project with many different components, depending on the nature of the work and how it is carried out, might well fall into different sectors. The Board in *Steen Contractors Limited*, [1989] OLRB Rep. Nov. 1173 made the following observation at page 1178:
>
> > Where the construction work for a particular project is closely integrated, as would be the case in the construction of a building, then all of the work of that project would fall within the same sector. Where however the work to be done is distinct, the responsibility for it is clearly severable and where such work appears to patently fall within one of the enumerated sectors of the construction industry, there is not any compelling reason to distort the concept of sector in order to find that all of the work on a project falls within the same sector.

> See also *Eastern Construction Ltd.*, unreported, Board File No. 1796-99-JD, decision dated October 20, 2000, Q.L. cite [2000] OLRD No. 4359 at paragraph 13 in which the Board wrote:
>
> > To distinguish between the end use of the project from that of the work itself in determining the issue of sector is not particularly helpful where, and as noted above, *the work in dispute is separate and severable constituting a project in itself.* [emphasis added]
>
> In *Eastern Construction Ltd., supra,* the Board was dealing with a jurisdictional dispute in relation to the installation of a sanitary sewer line and watermain between the property line and building line at the Port Edward Casino construction project. While the work in dispute was a part of the overall project involving the construction of a casino, the Board determined that the sewer and watermain installation was distinct and constituted a "project in itself".

The applicant urges the Board to disregard the sector issue raised by the responding party for purposes of determining whether Local 353 has standing to participate in this proceeding.

12. As the applicant points out, the issue raised in this grievance referral requires the Board to interpret the mobility provisions of the Principal Agreement, assuming the work done by the responding party at the Loblaws warehouse project is in the ICI sector of the construction industry. Although the applicant claims it is not seeking any remedy against Local 353, the applicant's grievance sought to have its members replace the members of Local 353 working at the Loblaws warehouse project. While the potential displacement of its members may not be enough to establish a legal interest in this proceeding, it seems to us the interpretation of section 17 of the ICI Portion of the Principal Agreement, by which Local 353 together with Local 1687 are obliged to act as "clearing house" for linework done in the province of Ontario, does create that legal interest.

13. The Board in *Jaddco E. Anderson Ltd., supra* did recognize the Act conferred status on "parties" to a provincial agreement to participate in a grievance referral involving the interpretation of that provincial agreement. The Board wrote at page 571:

> In order to be a party as of right to an application under section 124 [now section 133] of the Act, a person must be specified as a party by or under the Act, or be entitled by law to be a party. Section 124 itself provides that a grievance may be referred under it by "...a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions...". Subsection 147(3) [now 163(3)] further provides that:
>
> > [a]ny employee bargaining agency, affiliated bargaining agent, employer bargaining agency and employer bound by a provincial agreement shall be considered to be a party for the purposes of section 124.
>
> Finally, subsection 147(2) [now 163(2)] makes a provincial agreement binding upon:
>
> (1) the employer bargaining agency;
> (2) the employers represented by the employer bargaining agency;
> (3) the employee bargaining agency;

> (4) the affiliated bargaining agents represented by the employee bargaining agency; and
> (5) the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) of the Act.
>
> When section 124 is read together with subsections 147(2) and (3), it is clear that the applicant Labourers' International Union of North America, Local 1036 and the employer Jaddco E. Anderson Ltd. whom the applicant made respondent to the application are parties as of right, as the two bargaining agencies would be if they had sought to intervene.

Thus, the Board concluded that the actual parties to the collective agreement, that is the two bargaining agencies, had the right to intervene, as did the employer named as the responding party by the grieving union.

14. In *The Plan Group Inc., supra* the Board denied standing to Local 105 on the grounds it did not have a legal interest in enforcing the Local 353 appendix to the Principal Agreement. The Board, at page 129-30 adopted the following analysis:

> 21. It is readily apparent that Local 105 has a legal interest in ensuring that the work performed on the project within its geographic jurisdiction complies with the master portion of the Principal Agreement and the Local 105 Appendix and that members of both Local 105 and Local 353 are paid in accordance with the Local 105 Appendix while performing work at the project. It is clear that the jurisdiction of Local 105 does not extend to enforcing the provisions of the Local 353 Appendix in relation to members of Local 353 who do not work on projects within the geographic jurisdiction of Local 105, in the same way that Local 105 would not have the jurisdiction to enforce the provisions of the Local appendices in any other parts of the province.
>
> 22. Thus, the question is whether the fact that members of Local 353 are working within the geographic jurisdiction of Local 105 by reason of the mobility provisions found in the master portion of the Principal Agreement enables Local 105 to enforce the Local 353 Appendix.
>
> 23. In my view, it does not. Local 105, although suggesting it has a legal interest in ensuring that the travel obligations in the Principal Agreement are enforced to preserve to the extent possible the work opportunities of its members, is in the same position as any other person or union bound by the Principal Agreement in respect of its application and enforcement. If they are not immediate parties to the dispute, then their interests are indirect. They might be incidentally or commercially affected by the result, but they would not be given standing to participate merely because they are bound by the same agreement. See *Ontario Power Generation Inc.*, unreported, Board File No. 0979-02-G, decision dated December 16, 2002 in which the Board wrote at paragraph 4:
>
> > Similarly, the Board has denied status to parties who assert that they are bound to the same or similar contractual language that the Board is going to interpret, and wish to be present to argue the meaning of those contractual provisions when they are adjudicated for the first time (see

> *Canadian Elevator Manufacturers Association*, [1976] OLRB Rep. April 574).
>
> To open up proceedings under section 133 to anyone claiming some interest in the result would seriously impair the Board's and the parties' ability to bring about a prompt resolution of disputes. While Local 105 is bound by the Principal Agreement, it does not, in my opinion, have any legal interest in the operation or administration of the Local 353 Appendix. Ensuring a consistent interpretation and application of a provincial agreement is a role that rests with the respective bargaining agencies.

15. The Board in *Doug Chalmers Construction Limited*, [2000] OLRB Rep. July/August 608 (August 11, 2000) discussed the difference between being a party for purposes of section 133 of the Act, which was the Board's focus in *Jaddco E. Anderson Ltd.*, *supra* and having standing to participate in the proceedings at pages 614-15:

> 19. The entire submission of counsel for Local 1256 rests on his assertion that
>
> > Section 133 (1) and 163 (3) of the Act define who is a party for the purpose of grievance referrals in the construction industry and sections 133 (10) and 133 (12) of the Act impose Fees on parties. These sections do not contemplate persons seeking party and/or intervenor status to be parties.
>
> We disagree with that assertion. Section 133 (1) does not define who is a party for purposes of a grievance referral. Rather, it simply provides that a party to the collective agreement may refer a grievance to the Board. Section 163 (3) does provide a definition, but that definition does not, in our view, limit the definition in the way asserted by counsel for Local 1256. It simply provides that any affiliated bargaining agent bound by a provincial agreement is to be considered a party for purposes of section 133. Local 1256 is an affiliated bargaining agent that is bound by a provincial agreement. Hence, it is a party for purposes of section 133 of the Act. Whether it has standing to participate in a hearing on the merits of a grievance is determined by the Board based on the circumstances of the case in which it is seeking to participate. In our opinion, that determination differs from determining whether it is a party under section 133 of the Act.

In *Doug Chalmers Construction Limited, supra* the issue before the Board was whether Local 1256 was obliged to pay the hearing fee Rule 31 requires parties in section 133 proceedings to pay before the Board determined whether it had standing to participate in the matter.

16. In this matter, unlike Local 105 in *The Plan Group Inc.* proceeding, Local 353 is seeking to intervene in a matter dealing with the interpretation of the master or ICI Portion of the Principal Agreement. Moreover, Local 353 has a direct role in how contractors hire and employ persons to do linework under the Principal Agreement.

17. We recognize that a significant element of the issue before us is determining what portion of the work the responding party carried out at the Loblaws warehouse project was linework and what portion, if any, of that work was inside electrician's work. In view of Local 353's role in acting as the

"clearinghouse" for individuals engaged in linework under the collective agreement and as the affiliated bargaining agent that represents most of the individuals doing linework in southern Ontario, where the work that was the subject of this grievance was being done, it appears to us the interest of Local 353 in this proceeding extends beyond a "mere" commercial interest, but is, in fact, a legal interest since its rights and obligations under the ICI Portion of the Principal Agreement may be determined in this proceeding.

18. In *Bruce Power LP*, [2004] OLRB Rep. May/June 479 (June 16, 2004), the Board dealt with a motion to deny standing to the Electrical Power Systems Construction Association ("EPSCA") in a grievance referral seeking a remedy against Bruce Power LP in which the calculation of the overtime rate for work performed on the afternoon shift was in dispute. The Board characterized the issue of standing in the following way at page 481:

> The question then is whether EPSCA is a person whose interests may be directly and adversely affected by an adjudication of this collective agreement – an agreement to which EPSCA is bound as a signatory party.

In determining that EPSCA had a legal interest in the proceeding and therefore had standing to participate in the grievance referral the Board wrote at page 481:

> 11. ... In this case, the issue is the applicable monetary rate to be paid for certain work performed under a collective agreement to which the intervenor EPSCA *is a party*. Under Article 13 of the agreement, EPSCA has specific responsibilities pertaining to the employment of union members. It is not a third party seeking to inject itself into another's affairs, but a party both bound to and involved in the day-to-day operation and administration of the collective agreement.
>
> 12. Therefore, EPSCA is a party with a direct legal interest in this proceeding. The Board accordingly finds that EPSCA has status to participate as a party herein.

19. In the same way EPSCA had a legal interest in the Bruce Power LP proceeding because it had "specific responsibilities pertaining to the employment of union members" under the collective agreement to which it was a party, we find that Local 353 has a legal interest in this matter because it too has a role "pertaining to the employment of union members" in relation to linework performed under the ICI portion of the Principal Agreement.

20. The responding party has raised a sector issue. Local 353, for purposes of seeking standing in this proceeding, is prepared to align itself with the responding party in relation to the sector issue. The applicant claims the sector issue raised by the responding party is patently without merit. The applicant submits the Board should not countenance a party raising an argument in a grievance referral that clearly has no merit whatsoever as a vehicle for finding an intervenor has standing to participate when that intervenor would have no other basis to claim a right to participate.

21. The applicant acknowledges that if the Board were to find the work undertaken by the responding party was not in the industrial, commercial and institutional sector, then its grievance would have to be dismissed. But, it contends the sector issue raised by the responding party has no merit and should be dismissed without allowing Local 353 to participate.

22. The responding party has not had an opportunity to address the sector issue it has raised because the Board was dealing only with whether Local 353 had a right to participate in this grievance referral. In such circumstances, it would be unfair to the responding party and Local 353 to comment upon the merit, if any, of the sector argument on which the responding party wishes to rely. Given our view of the right of Local 353 to participate as a party in this proceeding by reason of its legal interest in the interpretation of the ICI Portion of the Principal Agreement, the Board need not address the applicant's argument with respect to a patently unmeritorious position being used to justify finding an intervenor has standing to participate.

23. In the result, the objection of the applicant to Local 353 participating in this grievance referral is dismissed.

24. At the commencement of the next day of hearing, the responding party and intervenor must set out all the facts on which they wish to rely to argue the work done by the responding party at the Loblaws warehouse project was not in the industrial, commercial and institutional sector of the construction industry. If the applicant disputes any of those facts, and the Board considers the disputed facts to be material to the issue, the responding party and intervenor will be required to adduce evidence to establish those disputed facts, if any, the Board considers material. Similarly, the applicant must be prepared to set out any facts it may wish the Board to consider in determining the sector issue raised by the responding party and be prepared to adduce evidence to establish those facts if the responding party or intervenor dispute them and the Board considers the disputed facts to be material to the issue. It is the Board's intention to hear the evidence, if any, and then receive the parties' submissions on the sector issue on the next day of hearing.

25. This matter is referred to the Registrar to be listed for hearing in consultation with the parties.

26. This panel of the Board remains seized with this matter.

3798-05-R; 3958-05-U Construction Workers Local 52, affiliated with the Christian Labour Association of Canada, Applicant v. **Pre-Eng Contracting Ltd.** and Constaff Construction Ltd., Responding Parties v. Labourers' International Union of North America, Local 506 and Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America, Intervenors; Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. Pre-Eng Contracting Ltd. and Constaff Construction Ltd., Responding Parties

Certification – Construction Industry – Employer support – Unfair Labour Practice – The organizing campaigns of the Labourers, Carpenters and CLAC overlapped, and although CLAC's campaign began last, it filed its application first – At one of four sites there was a hostile rejection and restriction of the Labourers' representatives, in contrast to unhindered meetings in the trailer for the CLAC representative – At two other sites, the Board found that the site superintendents assisted the CLAC representative by coordinating the employees' availability after work – The employer is bound by the actions of its agent, the site superintendents – The Board found the support by the superintendents to be in violation of s.

15 as it undermined the necessary arms-length relationship between a bargaining agent and an employer, and it meant that the Board could not rely on the membership evidence – Application dismissed

BEFORE: *David A. McKee*, Vice-Chair.

APPEARANCES: *Jack B. Siegel, Johnathan Van Huizen* and *Paul Graham* for CLAC; *Daniel Leone* and *John Gregoris* for Pre-Eng Contracting Ltd.; *Elizabeth Mitchell, ElioToppan, Carlo DiBlasion* and *Sergio Fera* for Labourers, Local 506; *David Watson, Mike McCreary, Phyllis Gallimore* and *Jim Morris* for the Carpenters Union.

DECISION OF THE BOARD; April 8, 2008

1. This is an application for certification brought pursuant to the construction industry provisions, and in particular section 128.1, of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The Employer is, in fact, two corporations that have a close relationship, and will be referred to as "Pre-Eng" in this decision. The applicant is the Christian Labour Association of Canada ("CLAC") and the application was filed February 16, 2006. There are two other applications that were filed shortly after this one. Labourers International Union of North America, Local 506 ("the Labourers") applied for their standard section 158(1) bargaining unit on February 23, 2006 and Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America ("the Carpenters") applied on February 28, 2006 for its standard section 158(1) bargaining unit. This decision, and the lengthy hearings that preceded it, deal only with CLAC's application, and the unfair labour practice complaint filed by Local 506 to the extent that it relates to that application.

2. The organizing campaign of the three unions overlapped. Chronologically, the Labourers began first, followed shortly thereafter by the Carpenters. CLAC commenced its organizing last and filed its application before the other two. The Labourers and the Carpenters assert that the application by CLAC should be dismissed because CLAC was the willing recipient and the beneficiary of employer support in its organizing campaign. That is the only issue dealt with in this decision.

3. The evidence was heard over many days between June 1, 2006 and February 8, 2008. There was a considerable lack of organization about the Labourers' case that led to numerous objections and limitations on the use of evidence. These are dealt with in more detail at the end of this decision. I have excluded certain evidence in rendering this decision. Pleadings were amended before the evidence began. The Labourers sought again to amend their pleadings on November 13, 2006. In an oral ruling at that time, I permitted the amendment to pleadings, but stated that I would refuse to draw any negative conclusions about John Gregoris, one of the principals of Pre-Eng, who had already testified. Later I refused to allow the Labourers to call a witness named "Oscar" about a previous inconsistent statement allegedly made by one of CLAC's witnesses, Mr. Luis Bolanos, that had not been put to him during cross-examination. Finally, I permitted Local 506 to call two witnesses, Abel Pena and Orith Frith, subject to a ruling about the admissibility of some or all of their evidence. I conclude that the few elements (with one exception) of their evidence that are of significance in this case were not put to witnesses called by CLAC or Pre-Eng when they should have been, and accordingly, I have ignored this evidence in its entirety in making this decision.

Background

4. Pre-Eng had six sites under construction during the time relevant to these applications. Two of them had one labourer each working on them and I heard no evidence about either one of those sites. The other four were the "Churchill Meadows" site in Mississauga, the "Sanford School" site in Hamilton, the "Hillcrest School" site in Hamilton, and the "Aspen Springs" site in Bowmanville. The organizing campaign of CLAC was conducted primarily by Paul Graham. He was assisted in his efforts by Luis Bolanos, who travelled with him to translate his words into Spanish for the benefit of those Spanish-speaking persons whose English was limited. Both Mr. Graham and Mr. Bolanos worked on the Churchill Meadows site. Both travelled to the two Hamilton area projects on one occasion each and Mr. Graham travelled to the Bowmanville site on one occasion. Since cards were collected on one occasion at each site, I will deal with the facts relating to each one separately.

5. Paul Graham was not a managerial employee, nor could he reasonably have been perceived by employees as a managerial person. He was a long-term employee, had a vague and not very significant family relationship with one of the principals of Pre-Eng, and was trusted with keys and with more tasks to perform on his own than other employees. He instructed others in their work from time to time. He was not, however, managerial in any sense. In the ordinary course of his duties, he did not travel from site to site, but remained working at a single site. In early 2005, he worked only at the Churchill Meadows site.

6. Indeed, Paul Graham worked very hard at Churchill Meadows and elsewhere. Pre-Eng maintained a system of "banked overtime" to level out paycheques from one week to the next. Paul Graham said that he worked as much time as he could, and the results were evident in the company's overtime records. He had accumulated 868.5 hours of banked overtime as of February 5, 2006. The next highest employee had 485 hours and the third highest employee had only 203.5 hours. He was thus in a position to ask for time off when he needed it. Indeed, most supervisors would be hesitant to deny time off to an employee who had accumulated so much overtime. Hence, his ability to ask for and receive time off was not remarkable, but his trips to other job sites for the purposes of meeting with employees were.

7. Mr. Graham is also a man who is extremely fixed in his views. To suggest that his outlook on life is firm would be to understate the granite-like nature of his opinions. Mr. Graham wanted no part of any trade union. He spent many years working under a collective agreement negotiated by the Seafarers International Union, and concluded that such a collective agreement simply meant that members spent long periods of time in the hiring hall, waiting to be sent out to a job. He made no secret of his dislike for all unions, and he simply regarded CLAC as the best of a bad lot. Its main attraction for him was the absence of restrictions on mobility or on being hired, rehired or recalled by an employer. His views are quite genuinely held and are not based on any suggestion or urging from his employer.

8. Mr. Graham first became concerned about unions when he became aware of the Labourers' organizing campaign. He heard about CLAC from an employee of the electrical subcontractor on the Churchill Meadows site, who was working under a CLAC collective agreement. What he heard from this employee interested him enough to contact the local CLAC office and to seek an interview with Chris Bosch. After his interview with Mr. Bosch, he agreed to attempt to solicit cards from CLAC. He received certain advice from Mr. Bosch about when and how to collect

cards. This advice was, in the abstract, reasonable. The problem, as always, is in the context and the details, both of which cause some considerable problems in this case.

Organizing Efforts by Paul Graham

Churchill Meadows

9. Paul Graham worked at the Churchill Meadows site in Mississauga, and began to solicit membership evidence there first. The Labourers had begun to organize the site in January of 2005. It was, in fact, their organizing efforts that attracted Paul Graham's attention. They also attracted the attention of Les Juranyi, the site superintendent. On one occasion, two organizers from the Labourers went on to the site. In error, they walked into a site meeting that was going on. Mr. Juranyi ordered them off the site and told them that if they ever returned, they would be charged with trespassing. The Labourers then focused their efforts on trying to speak to employees as they came to work, or by calling to them through the fence or on the perimeter of the site. Later, having obtained the addresses of some employees, they visited them at home. Mr. Juranyi believed that the Labourers' organizing efforts were distracting to employees and slowed down work. He therefore, in Mr. Graham's words "confronted" the Labourers' organizers whenever they appeared and chased them away.

10. There is nothing improper about an employer maintaining that kind of control over a site, nor is an employer required to be polite about its dislike of the union's organizing efforts. The depth of Mr. Juranyi's opposition to the Labourers is perhaps best depicted by a comic-opera scene which occurred after the application for certification filed by the Labourers had been processed by the Board. Two organizers from the Labourers came to the site to check the Board posting of the Labourers' application for certification. They went looking for Mr. Juranyi, who became apprised of their presence. He ordered them off site, but in the meantime arranged to have the vehicle they were travelling in blocked from movement. He ordered Paul Graham to bring a front-end loader to fix a gate that had been broken, and through which egress from the site was to be had. Mr. Graham testified that Mr. Juranyi simply happened to order him to fix the gate just at the moment when the Labourers' organizers were attempting to leave the site as ordered. That assertion is so absurd that it can only be a deliberate misstatement of the facts. Mr. Juranyi then stationed himself in front of the vehicle so that it could not proceed. He also called the police and sought to have some form of criminal charge laid against the two organizers. I heard no evidence of any such charges.

11. None of this could have had any effect on any of the employees at times relevant to any of the applications for certification. However, it is reasonable to assume that Mr. Juranyi's "confrontation" with Local 506 at the perimeter of the site during the labourers' organizing was sufficiently hostile to leave no doubt in anyone's mind as at his views.

12. CLAC's organizing efforts took a different course. All of the sites were equipped with a job site trailer, which contained the superintendent's office and a larger area where employees could eat their lunch or rest during coffee breaks. Mr. Graham decided to have an organizing meeting there. Both he and Mr. Juranyi said there were no rules about the use of the trailer and employees could use it at any time for any purpose. Mr. Graham spoke to employees, pointing out the value of membership in CLAC and collected membership cards. Mr. Juranyi was not there at the time, but since his office was also in the trailer, any employee would know that he might appear at any time. Mr. Graham said that the meeting lasted 30-45 minutes, that is, it is possible that it extended beyond the time for an ordinary lunch break. This was the only meeting.

Aspen Springs

13. Mr. Graham's approach at the Aspen Springs site (which he visited last) was different and again stands in contrast to Local 506's treatment at Churchill Meadows. He arrived very early, before any employee was there. The first person he met was Rick McVety, site superintendent, or perhaps simply a lead hand. Mr. Graham advised Mr. McVety that he wanted to speak to employees before work; Mr. McVety said that was fine with him. Mr. Graham then spoke to each employee as they entered the site and solicited membership in CLAC from them. He knew all of them personally as fellow employees. He estimated that the time spent doing so took 30-45 minutes, although this seems overlong long for the two or three employees who were on the site. Mr. McVety did not seem troubled by the fact that employees were delayed from starting work that day. On the other hand, I have no evidence of any conversation or planning between the two site superintendents, or indeed any communication between employees on the two sites, so that the contrast is not one that would necessarily have been obvious to any employee.

Sanford School

14. After Paul Graham finished collecting cards at Churchill Meadows, he decided next to visit the jobs in Hamilton. The locations of the two sites was not a secret; they were posted on the wall of the trailer. Again, he took Luis Bolanos along with him to translate. The timing of his visit was the subject of much cross-examination. Messrs. Graham and Bolanos left work mid-afternoon and drove to Hamilton. He said that he knew employees would be working late because they were involved in a concrete pour that was scheduled that day. He based this belief on the fact that he had seen insulating blankets being shipped from the Churchill Meadows site to the Sanford site a day or two before. That does not, of course, explain how he knew that the pour would take place at the end of the day, or even on that particular day, and would involve employees working overtime (so that they would still all be there when he arrived at the end of the day). This was not an issue he addressed at all.

15. Before Messrs. Graham and Bolanos arrived at the Sanford site, an employee working on that site, Hassan Kismetli, who was the Occupational Health and Safety representative and perhaps had some other lead hand functions, told employees that there was to be a meeting at the end of the day. He told them they were to assemble in the job trailer at that time. He said that two persons wanted to speak to everyone. As it turned out, those two persons were Paul Graham and Luis Bolanos.

16. The site supervisor on the Sanford School site was Issac Sela. He worked in an office which occupied a portion of the job trailer in which the employees ate lunch and had coffee. He often ate with them. On at least two occasions, there were discussions about the organizing activities of the Labourers. On one or both occasions, he spoke disparagingly of unions. He stated that, in his words: "Sometimes unions can act like a mafia organization". In cross-examination, he defended this view quite vigorously. He also agreed that he had said that Labourers Local 506 had geographic limitations on where its members could work. Presumably the list of jobs in his trailer also indicated jobs in Toronto, Mississauga and Bowmanville. He agreed that he said that when union members ran out of work, they were laid off and were obliged to return to the hiring hall and wait to be referred out to the next job. He described this as simply a fact of life that everyone knew (although he himself was unclear and indeed incorrect about the details of recall rights and so on).

17. Issac Sela left the job site early that day. Both he and an employee called by Local 506 agreed that he occasionally left work before the end of the working day. In this case, there was additional work for which employees were asked to work overtime, but he felt he could leave the site despite that. This issue was not pursued in cross-examination.

18. When Paul Graham and Luis Bolanos arrived, employees assembled or had already assembled in the trailer. Paul Graham did most of the speaking, with Mr. Bolanos translating. In fact, most of what Mr. Graham said, divorced of its context, was entirely innocuous. He described the benefit of insurance plans that CLAC was a party to and said that "CLAC is good for you and your families". His promises of wage increases were vague, although he must have said something about attempting to bring wages up to the industry standard. He did make reference to the Labourers' organizing. Although the evidence is contradictory, I conclude that he did refer to Local 506's hiring hall, and I conclude that given his strong beliefs about the ill-effects of a hiring hall, he no doubt put it in very negative terms. I find as a fact he did not say that Pre-Eng wanted employees to join CLAC rather than Local 506.

19. One employee, Sergio Feria, said he wanted to think it over and took his card with him. That evening he decided to sign the card and returned with the fully-executed card the next day. He told Hassan Kismetli that he had signed it and asked him what he should do with it. Mr. Kismetli said to take it to Issac Sela. Hassan Kismetli was not called as a witness, although the essence of the actions and words attributed to him were properly pleaded.

20. Sergio Feria went to Issac Sela and asked him what he should do with the card. Mr. Sela's response was "Call your organizer, Luis Bolanos". Mr. Feria said he did not have his telephone number. Mr. Sela said "Well, either call him or leave it on the desk so that Luis Bolanos can pick it up when he passes by". Mr. Sela said he told Mr. Feria to put the card on his (Mr. Sela's) desk. Mr. Feria and another witness testified that Mr. Sela took the card in his hand. In my view, there is no difference between taking custody of it by telling Mr. Feria to put it on his desk and taking it his hand and then putting it on his desk. In fact, according to Luis Bolanos, it was Mr. Graham who picked up the card later that day from Issac Sela. Sergio Feria certainly noticed that the card had gone from the desk when he was in the trailer later.

21. Issac Sela denied that there was any discussion between himself and Paul Graham about this visit. This is simply at odds with the objective facts and the admitted or uncontested evidence. Issac Sela's convenient departure (despite the fact that employees were working overtime) and Hassan Kismetli's direction to take the card to Mr. Sela, and the fact that Mr. Sela agreed to accept it (even if somewhat casually) lead me to conclude that Issac Sela knew of the meeting and was prepared to cooperate to facilitate Mr. Graham's organizing on behalf of CLAC. In addition, as indicated, there must have been some consultation between Mr. Sela and Mr. Graham for Mr. Graham to know that pour would take place that day and would extend past the end of the day so that he could plan his visit.

Hillcrest School

22. The third site was also in Hamilton at Hillcrest School. Paul Graham and Luis Bolanos tried to visit the site after the Sanford site. Again, Paul Graham denied that this visit had been arranged, but he had no explanation as to why he expected employees to be there after hours, particularly when employees on the Sanford site had already worked some overtime at the end of

their day. Mr. Bolanos testified that he understood that Mr. Graham had "arranged" the visit in some fashion. Again, I conclude that the meeting was arranged.

23. However, no such meeting took place. Because of the darkness or bad directions, Mr. Graham got lost and did not reach the site until long after everyone had left. He and Luis Bolanos did attend at the site the next day and met with employees in the job trailer. Again, the site superintendent, Gabriel Niccolai, was not in the office, although there was no evidence that he had left the site in a way that would tell employees that he would not be returning during the lunch hour. At this meting Paul Graham and Luis Bolanos solicited membership application in CLAC.

Conclusions

24. On the basis of these findings, I conclude that CLAC, in the person of Paul Graham, received employer support from three of the four site superintendents, who were the agents of Pre-Eng. I do not find that their support was arranged, solicited or coordinated by the principals of Pre-Eng; there is simply no evidence of that. Similarly, I do not find that Mr. Bosch of CLAC or any other officer of CLAC had any knowledge of what Mr. Graham had arranged or what support he received from the site superintendents. However, parties are bound by the actions of their agents. The support of three of four persons who were placed in charge of the sites by Pre-Eng, who controlled access to the site and were responsible for the performance of work on the site, to the one representative of CLAC who did all of the organizing work, constitutes employer support by Pre-Eng for CLAC. I find this support is contrary to section 15 of the Act.

25. In *Covertite Eastern Limited*, [1996] OLRB Rep. May/June 386 (May 10, 1996), the Board summarized the fairly uniform meaning and application the Board has given to section 15 since 1952. At paragraphs 55 and 56, the Board said:

> 55. Section 15 [formerly section 13 of the Act] provides as follows:
>
> > **15**. The Board shall not certify a trade union if any employer or any employer's organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms*.
>
> 56. The Board has made it clear in its jurisprudence that the purpose of section 15 is to preserve the arm's length relationship between unions and employers which is fundamental to the structure of the Act. A purposive, rather than literal, application of the section has found favour in the Board's jurisprudence, and is in our view the appropriate approach. Thus, not everything that an employer does that might be said to be supportive of an organizing campaign is sufficient to warrant the application of section 15. It is activity which is of a character or proportion such that it is reasonable to infer that employees have not exercised a free choice in the matter of the selection of a bargaining agent. See, for example, *Edwards v. Edwards*, (1952), 52 CLLC ¶17,027 and *Ontario Hydro*, [1989] OLRB Rep. Feb. 185 and *University of Toronto*, [1988] OLRB Rep. March 325. The purposive interpretation has meant that the provision of a list of employees to a union in an organizing drive by the employer contravened section 13 [now 15] in *Tri-*

> *Can*, [1981] OLRB Rep. Oct. 1509 but not in *Continuous Mining*, [1990] OLRB Rep. April 404, because in the former the trade union applicant had been formed to thwart another union's organizing attempts, while the applicant in the latter had a long history of arm's length collective bargaining with the parent of the employer.

That is, any set of facts must be seen in their proper context and examined to determine whether or not they are evidence of the kind of mischief that section 15 seeks to prevent.

26. In this case, I cannot say that permission to speak to employees at the Aspen Springs site constitutes employer support within the meaning of section 15. It forms an odd contrast to what happened at Churchill Meadows, but there is no evidence that any employee saw the contrast at that time (other than Paul Graham). Allowing employees time to speak to an organizer before coming to work is odd, but it is not linked directly to any other pattern of behaviour. The actions of Mr. Juranyi at the Churchill Meadow site do constitute employer support. The hostile rejection and restriction of Labourers' representatives, in contrast to the unhindered meeting in the trailer, would no doubt have been clear to any employee. The absence of evidence of any coordination of this meeting between Mr. Juranyi and Mr. Graham lessens the impact of this evidence. Indeed, had this been the Labourers' only complaint, that might not have caused the Board to do anything.

27. However, the obvious coordination of Paul Graham's organizing and the site superintendents of the two Hamilton sites goes far beyond any acceptable behaviour. It clearly provides a substantial advantage to CLAC's organizing over that of the Labourers and the Carpenters. Such activity undermines what ought to be an arms-length relationship between a bargaining agent and an employer. Further, the message to employees could not be clearer. The message of the Employer, through the site superintendents, was that CLAC was to be preferred over Local 506. It was a likely and reasonable conclusion on the part of employees that the soliciting of cards for CLAC was done with the knowledge and approval of their Employer and was a course of action the Employer clearly favoured. In addition, Mr. Sela's comments about the hiring hall rules of the Labourers' Union, as contrasted with the more unrestricted approach of CLAC, set the stage for Mr. Graham's comments that would persuade a reasonable employee to perceive that his interests and the employer's were linked and allied against those of the Labourers. Thus, section 15 of the Act is applicable in these circumstances. Employer support undermines the necessary arms-length relationship between a bargaining agent and an employer, and it means that the Board cannot rely on the membership evidence submitted by CLAC as a representation of the true wishes of the employees.

28. For these reasons, this application must be dismissed.

Excluded Evidence

29. Much argument was directed both during the evidence and final argument about what to do when a witness gave evidence, or was about to give evidence, that was not consistent with the pleadings, or with respect to matters that were wholly outside the pleadings.

30. During the course of this case, I permitted virtually all of the contested evidence to be called. I did so, in part, because of the different view I take of what is called the Rule in *Browne v. Dunn* [1893] 6 R. 67 (H.L.) from counsel for the Employer and CLAC, and partly for practical reasons. Most of the witnesses the Union called were employees of Pre-Eng at the relevant times.

They are no doubt skilled trades people, but have a (perhaps fortunate) lack of understanding of most concepts relating to legal relevance and admissibility. I heard the evidence of a number of witnesses that were mixed in their content. Some of the facts to which they would have testified were entirely proper and admissible, had been properly pleaded, and propositions had been put to Employer and CLAC witnesses during their cross-examination. Other portions of the testimony were entirely new and not matters that had been raised before in the case. I concluded that it would be impossible to require a witness to tell the truth, the *whole* truth, and nothing but the truth, but then to instruct him or her during evidence that the Board did not want to hear about part of the whole truth. One witness, Mr. Pena, was convinced that the hearing was about his WSIB claim and frequently alluded to it. That was something I did direct him not to discuss, since it was entirely separate from the incidents which he was called to testify about, but he continued to refer to it in his testimony. Had I attempted to tell him that parts of the story that he was telling about relevant matters were acceptable and parts were not, I have no doubt that he would not have understood at all. The likely consequence of a continued set of objections and distinctions would have the effect of making the evidence incoherent, or would result in the witness retreating into a state of confused silence. There may well be consequences for the party calling the witness, but fairness to the witness himself makes it preferable to rule on that kind of objection after the evidence is given.

31. The most glaring examples of the problem were the evidence of Orith Frith and Abel Pena. The first day of evidence in this matter was June 1, 2006. These two gentlemen took the stand on September 1, 2007 and June 19, 2008. Much of their evidence dealt with matters entirely new to the proceeding, or specific details that had not been put to the Employer's witnesses during cross-examination. Some of this evidence appeared to be related to factual issues that had been the subject of pleadings and of cross-examination.

32. I accept that counsel for the Union did not particularize the evidence of these two witnesses in writing, or put the substance of their evidence to any witness during cross-examination because she did not know of the facts until well after the Union began to call its evidence. She stated that she had been advised that they were unwilling to attend at her office to be interviewed and that she had caused summonses to be served on both of them (along with others) to attend the hearings. She spoke to them in a nearby coffee shop the morning of the hearings and learned their stories only at that time.

33. Pre-Eng and CLAC objected to hearing the evidence, and once it was heard, to the Board considering it at all. They both relied on the Rule in *Browne v. Dunn* and the absence of any notice to them of this evidence. The Labourers and Carpenters argued that the Board ought not to apply the Rule in *Browne v. Dunn* in its proceedings generally, and that the specific prejudice in this case might be cured by the opportunity to call evidence in reply.

34. The issue of the application of the Rule in *Browne v. Dunn* comes up far too frequently before the Board. It is a rule that has been elaborated by the Courts many times since it was first articulated in 1893, and has become a far more elaborate rule than what was articulated in that judgement. The Board has examined *Browne v. Dunn* and the caselaw that has emerged from it in *John Boddy Developments Ltd.* [2006] OLRB Rep. May/June 360 (May 31, 2006). It is, fundamentally, a rule of fairness. It is also a rule that arises out of the context in which it occurs, that of civil trials. That is a process where discovery of documents and of one or more principals are a regular feature of pre-trial preparation. Motions may be brought for various reasons to expand the scope of pre-trial discovery of various sorts. Almost the last thing to be done before a trial is to

exchange a list of witnesses that a party plans to call. Thus, before the first witness is called, all parties have, or should have, a very great deal of information at their disposal.

35. Counsel for the Carpenters relied on an article by Judge Gilles Renaud of the Ontario Court of Justice about the use of *Browne v. Dunn*, and one (of many) decisions of the Ontario Court of Appeal: *R. v. Paris and Flood* [2000] 150 CCC (3d) 162. The essence of both this decision and the article is to suggest that the Rule in *Browne v. Dunn* has no application in criminal trials and that the opportunity of the Crown to call reply evidence cures any unfairness. The context of a criminal trial is, of course, very different from a civil trial. The Crown has increasing disclosure obligations, but the accused has virtually none, aside from specific defences (alibi, etc.).

36. The Rule of *Browne v. Dunn* is a rule of fairness, and that fairness must be seen in the context of the process of the Board. There is an obligation on both parties to plead all material facts, but not the evidence by which the party seeks to prove those facts. There is no discovery process, but parties frequently exchange all relevant documents, and/or seek orders from the Board that such documents be produced. The evidence of Mr. Pena and Mr. Frith was evidence of statements and conversations, not documents. Proceedings before the Board have some resemblance to criminal trials in that parties are frequently forced to call as witnesses, persons who would rather not be involved, whose testimony is uncertain, and whose willingness to be identified with one side or the other is unknown or variable.

37. However, this is a civil proceeding. Unlike accused persons, a party has a choice of whether or not to litigate a case. Part of that decision will depend on the availability of reliable witnesses. The employer is obliged to proceed first in many cases, and in cases in which section 96(5) is engaged, bears the onus of disproving the union's allegations. One of the fundamental rules of natural justice is that a party is entitled to be told in advance of presenting its case the substance of the case or allegations it must meet. This can only be done by way of pleadings, amended or otherwise. This too is a rule of fairness. Unlike the Crown, the employer does, and is expected to have, a stake in the outcome of the case and is entitled to that same sort of fairness.

38. The first time this issue arose was in respect of certain amendments that the Labourers wished to make to their pleadings on November 13, 2006. By this time, Mr. Gregoris (one of the principals of Pre-Eng) and Mr. Sela had already given evidence. I ruled at that time that, although I was extremely troubled by the amendments, on balance I was prepared to permit them. Much of the proposed amendments dealt with matters that had not yet been the subject of anyone's evidence. In making that ruling, however, I also ruled that there were a number of statements or propositions that ought to have been put to Mr. Gregoris in cross-examination. Specifically, as I read the pleadings, the Union was likely to ask me to conclude that Mr. Gregoris was aware of what went on at the various sites. I ruled that, although I would hear the evidence covered by the pleadings, I would not, under any circumstances, rely on that evidence to conclude that Mr. Gregoris was wrong, mistaken or untruthful when he said that he was unaware of the site meetings or of the persons circulating among them. It would simply be an unfairness and indeed potentially a violation of natural justice, to make a credibility finding against him on the basis of evidence not put to him while he was in the stand. With respect to the other matters pleaded, I indicated that the delay in making those pleadings in and of itself rendered any such evidence less trustworthy and that evidence would have to be extremely compelling on those points. Much of it was not.

39. The next occasion on which the Labourers sought to introduce such evidence came during the time when the Labourers were calling evidence. Counsel for the Labourers advised that she planned to call a witness named Oscar. Oscar's evidence would be essentially that Luis Bolanos, who had already testified, had made a prior statement inconsistent with his evidence in the stand. Since that was the only evidence Oscar would give, and since Mr. Bolanos had not had the proposition put to him in the stand, I declined to permit the Labourers to call that witness.

40. Finally, objections were raised numerous times during the evidence of Orith Frith and Abel Pena. These witnesses presented the classic problem of evidence that was so intertwined with relevant and admissible evidence that it was unlikely that I could properly direct them as to what their evidence should avoid. I therefore heard all of their evidence and simply noted the objections made by counsel for the Employer and CLAC during that time. In the end, I concluded that the only evidence that added anything at all to the case (with one exception) was evidence that had not been pleaded and had not been put to other witnesses, particularly Mr. Bolanos and Mr. Graham. To consider that evidence at all would be to require me to make a credibility finding as between them and CLAC's two witnesses, on the basis of assertions not put to either of them during cross-examination. I therefore conclude that in fairness, I must exclude any consideration of all of their evidence.

41. In my view, it is not sufficient to say that the prejudice can be cured by calling witnesses in reply evidence. The evidence of the Employer and of CLAC was extensive, and cross-examination took place over a number of days. The Employer and CLAC would have been required to call virtually all of their witnesses again. Since the issues were issues of credibility, it would not have been satisfactory simply to call them on the specific points raised in Mr. Pena's and Mr. Frith's evidence. In order to properly assess credibility, both the re-examination-in-chief and the re-cross-examination might and probably should have ranged over all of the evidence in order to assess whose story was the more likely. Thus, the hearing would have doubled in length. No doubt, cross-examination of a witnesses would have covered the new facts asserted by Mr. Pena and Mr. Frith and no doubt might have invited comparison with precisely what the witness had said on dates reaching back to June of 2006. This process would be made more complicated by the absence of a transcript. At that point, the hearing would have become a shambles and it would have been grossly unfair to both the witnesses and to Pre-Eng and the Employer. For that reason, I have ignored all of their evidence in this decision.

42. On reflection, there is one part of Mr. Pena's evidence that I would have relied on but I decline to do so because of the process that I adopted. Because of the result in this case, I do not need to deal with this issue. I conclude that the process I adopted was faulty in one respect. Mr. Pena gave evidence about Mr. Nicolai, the site supervisor at Hillcrest School in Hamilton. He had not been called to testify. In light of Mr. Bolano's evidence that Mr. Graham had made an "arrangement" to see the employees at Hillcrest School, he might well have been called by either CLAC or Pre-Eng as part of their initial case. He was not. The substance of any involvement on the part of Mr. Nicolai was put (if only barely) to the other relevant witnesses in cross-examination. Had I advised the parties that I might rely on the evidence of Mr. Pena in regard to Mr. Nicolai, and had CLAC or Pre-Eng called him in reply, I would then have heard his evidence.

43. Neither Pre-Eng nor CLAC called any reply evidence. However, counsel should not have been put to the task of guessing what my ruling was likely to be. I ought to have given a ruling about the evidence of Mr. Frith and Mr. Pena, or any portion of it, immediately after their evidence had

been given. In that way, both parties would have known whether or not it was necessary to call reply evidence without guessing. Given that I did not do so, it would be unfair to Pre-Eng and to CLAC to rely on that portion of Mr. Pena's evidence. However, since I have excluded consideration of all of Mr. Pena's evidence, and to do so does not affect the result, I do not need to deal with this issue now.

Conclusion

44. For the reasons expressed above, I find that Pre-Eng provided support to CLAC in its organizing campaign leading up to this application for certification, contrary to section 15. Accordingly, the Act requires that the Board shall not certify CLAC, and this application is dismissed.

2412-07-U David Vidal, Applicant v. National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW) Local 462, Responding Party v. BRR Logistics Limited, Intervenor

Discharge – Duty of Fair Representation – In this member's complaint against his bargaining agent, the Board found that the union's reliance on Canada Post's tracking system for registered mail to determine when the member received a recall notice did not encompass all the various possible interpretations of when delivery was effected – The union was ordered to obtain a legal opinion on "effective delivery" and to reconsider the member's complaint in light of that opinion – Application allowed in part

BEFORE: *Kelly Waddingham*, Vice-Chair.

APPEARANCES: *David Vidal* appearing for the applicant; *Bruce Toman* and *Randy Begg* appearing for the responding party; *Herbert Law* appearing as counsel for the intervenor; *Bob Hockney* and *Sandy Norval* appearing for the intervenor.

DECISION OF THE BOARD; March 6, 2008

1. This is an application under section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The applicant, David Vidal ("Vidal") alleges that the responding party trade union National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW) Local 462 ("CAW") has contravened section 74 of the Act.

2. A consultation into this matter was held on February 7, 2008. At the commencement of the consultation I noted that Vidal was not represented by counsel. I informed him that I would be pleased to answer any questions he might have about the Board's processes, but that I could not provide him (or any other party) with legal advice because that would be incompatible with my role as an impartial adjudicator.

The Facts

3. Except where otherwise indicated, the following facts were not in dispute.

4. On December 6, 2006, the employer intervenor ("BRR Logistics Limited") gave Vidal notice that in accordance with his seniority he would be permanently laid-off effective January 13, 2007.

5. On December 18, 2006, the CAW filed a grievance on behalf of Vidal alleging that the applicant's position on the seniority list was incorrect. As a result of the grievance, Vidal's seniority was adjusted and he was placed into "temporary work", in the place of a more senior employee, Derek Yateman ("Yateman") who was absent on short-term disability.

6. On January 18, 2007, Vidal was notified that he would be laid-off effective January 26, 2007, due to the return to work of Yateman.

7. On March 15, 2007, BRR sent to Vidal, via registered mail, a recall notice effective March 25, 2007 to perform temporary work.

8. On April 2, 2007, Vidal picked up the recall notice, and immediately contacted BRR Logistics. Vidal explained that he first received notice of the registered mail on April 2, 2007. Vidal was told to report to work the following day and explain his situation.

9. On April 3, 2007, when Vidal reported to work he was given notice that BRR Logistics had terminated his employment on March 30, 2007. In accordance with Article 7.04(c) of the collective agreement, an employee's employment is deemed to be terminated for just cause when the employee "fails to report to work within five days of delivery by registered mail of the notice…".

10. Vidal had neither returned to work nor contacted BRR Logistics.

11. On April 4, 2007, Vidal met with the Chief Union Steward, Randy Begg ("Begg") and requested that the CAW file two grievances. The first grievance was a termination grievance. The second grievance alleged the misuse of part-time employees contrary to particular articles within the collective agreement, thereby denying Vidal and other laid-off full time employees work.

12. Vidal provided Begg with a copy of the envelope which contained the recall notice. The back of the envelope has a date stamp of March 16, 2007. The front of the envelope has a date stamp of March 28, 2007. The applicant explained that he did not receive notice of the registered mail containing the recall notice until April 2, 2007, and that he had immediately picked up the correspondence and contacted BRR Logistics. Vidal drafted and signed the grievance which provided his version of events.

13. Vidal also reviewed with Begg his interpretation of the collective agreement and alleged that BRR Logistics was using part-time employees contrary to articles 7.06(c), 2.06 and 2.04 of the collective agreement. Begg advised Vidal that the CAW did not agree with his interpretation of the collective agreement and reviewed the articles and limits on the employer's use of part-time employees. Vidal drafted and signed the grievance which provided his interpretation of events.

14. On April 4, 2007, Begg met with the employer's Director of Logistics, Sandy Norval ("Norval") and presented the grievances. Norval provided Begg with a copy of Canada Post's tracking of the registered mail which was sent to Vidal. According to Canada Post's records, Canada Post attempted to deliver the registered mail to Vidal's home on March 19, 2007, but there was no

one present to receive the letter, accordingly a delivery notification card was left with pick up details. Canada Post's records indicate that Vidal picked up the registered mail containing the recall notice on April 2, 2007. Based on Canada Post's records, it was BRR Logistic's position that Vidal was late in picking up and responding to the registered mail and therefore he was properly terminated under Article 7.04 of the collective agreement, and the termination grievance was denied.

15. The company also denied the second grievance relating to the use of part-time employees. BRR Logistics argued that they were using part-time employees in accordance with Articles 2.01 and 2.04 of the collective agreement.

16. Immediately after meeting with the employer on April 4, 2007, Begg contacted Vidal and advised him that the employer had denied his grievances. Vidal returned to the employer's premises and met with Begg who showed him Canada Post's tracking of his recall notice and explained why the employer had denied the two grievances. Begg states that he invited and advised Vidal that the Step II meeting for his grievances was set for April 10, 2007. Vidal denies that he was told about the Step II meeting and states that he wanted to attend the meeting to "give his input".

17. On April 10, 2007, the Step II meeting took place. The CAW presented the applicant's grievances. The CAW requested to review Canada Post's tracking of Vidal's recall notice. CAW's National Representative, Bruce Toman ("Toman") pled Vidal's case and explained that Vidal had not received the notice until April 2, 2007. The company again denied the grievance and relied upon the specific discipline agreed to by the CAW within the collective agreement under Article 7.04. BRR Logistics also explained that the other employees that they had recalled had responded in a timely fashion, and that Canada Post's tracking indicated that a notification notice was left for Vidal on March 19, 2007. There was limited discussion regarding the use of part-time employees, other than BRR Logistics reviewing with the CAW their entitlement/limitations of using part-time employees in accordance with the collective agreement. The company denied both grievances.

18. Based on the specific penalty clause in the collective agreement, Canada Post's tracking of the notice sent to Vidal, the union's knowledge of the workplace, and the provisions of the collective agreement which allowed for the use of part-time employees the CAW decided not to proceed to arbitration with Vidal's grievances.

19. On April 11, 2007, Vidal contacted Begg and inquired about his grievances. Vidal denies that Begg inquired why he was not at the Step II meeting. Begg told Vidal that the employer had denied his grievances. Vidal came to the workplace and picked up a copy of the grievances. Vidal was upset that the response for the steps on the grievance forms were "basically blank". The termination grievance reads: "Decision stands – employee terminated". The grievance regarding the use of part-time employees reads: "Denied".

20. On April 24, 2007, Vidal met with Toman. Vidal reviewed the circumstances of the late delivery of his recall notice and his termination. He also had an opportunity to review the provision of the collective agreement upon which he relied for his interpretation that the employer was not using part time employees appropriately. Toman explained the meaning of a specific penalty clause and explained that because the collective agreement provided for automatic termination and the company had Canada Post's tracking information, that the CAW would not proceed to arbitration with Vidal's termination grievance. Toman reviewed with Vidal the CAW's interpretation of the provisions of the collective agreement which allowed for the company to use part-time employees.

Toman advised Vidal that BRR Logistics was abiding by the terms of the collective agreement and therefore the CAW would not pursue Vidal's grievance alleging that the company was improperly using part-time employees.

21. At the meeting of April 24, 2007, Toman explained the CAW's procedure in appealing a decision not to proceed with a grievance to arbitration and gave Vidal the President of the Local, Charles Redden's ("Redden's") telephone number.

22. On June 20, 2007, Vidal contacted Redden regarding the denial of his grievances. Vidal was concerned that neither Toman nor the Treasurer of the Local, Neil Wilson had advised Redden about the denial of his grievances. Redden told Vidal that he could file an appeal and provided Vidal with the CAW's facsimile number.

23. On or about June 20, 2007, Vidal attempted to send his appeal to the CAW's office. Vidal discovered that he had the wrong number. Vidal contacted the CAW's office and was provided with the correct number.

24. On or about June 21, 2007, Vidal sent at 6:30 p.m. his six page appeal to the CAW office. Vidal maintains that he confirmed receipt of delivery of his facsimile, shortly thereafter. The CAW's office closes at 5:00 p.m.

25. Approximately three weeks later, Vidal left a message for Redden, who promptly returned his phone call. Vidal inquired and was told that the CAW had not received his appeal.

26. On October 30, 2007, Vidal filed his application at the Board alleging that the CAW had violated section 74 of the Act.

DECISION

27. Section 74 of the Act provides as follows:

> **74.** A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

28. In the present case, the applicant alleges that CAW's refusal to take his grievances to arbitration and failure to investigate BRR Logistic's use of part-time workers in accordance with his interpretation of the collective agreement violates section 74 of the Act. The applicant argues that the CAW should have contacted Canada Post and done an investigation of the circumstances surrounding his termination. The applicant maintains that if the CAW had investigated and pursued his interpretation of the collective agreement, he would have won his grievance. Vidal alleges that the CAW was not forthright in their dealings with him and that they did not properly pursue his grievances at the Step II meeting with BRR Logistics as evidenced by the blank grievance forms, and the union's acknowledgement and subsequent refusal that they had received his appeal. In essence, the applicant's complaint in this case is that the union acted "arbitrarily" and in "bad faith" within the meaning of the Act.

29. The underlying issue that gives rise to this dispute relates to a difference of opinion between the applicant and the responding party respecting the interpretation and application of certain provisions of the collective agreement.

30. The CAW is not required to accept the applicant's interpretation of the collective agreement regarding the use of part-time employees and undertake an investigation to support the applicant's interpretation of the collective agreement. The fact that the applicant may not agree with the CAW's interpretation of the collective agreement does not make the bargaining agent's conduct arbitrary or in bad faith.

31. The fact that the applicant was allegedly given the wrong facsimile number or that the CAW alleges that they did not receive a copy of the applicant's appeal of the CAW's decision not to proceed with the grievances to an arbitration hearing is not bad faith. The union showed no hostility toward the applicant. The union may have inadvertently given the applicant the wrong facsimile number or he may have mis-heard the number.

32. It is trite to observe that no employee has the right to insist that a grievance be filed on his or her behalf, or that, once filed, such grievance be pursued to arbitration. That decision is the union's to make and so long as its decision-making cannot be characterized as arbitrary, discriminatory or made in bad faith, there is no possible contravention of section 74 of the Act.

33. When a union refuses to take a termination grievance to arbitration, the Board is particularly stringent. As the Board stated in *United Textile Workers of America (Local 478)* [1995] OLRB Rep. September 1193 (September 27, 1995):

> Discharge from employment has often been referred to as "industrial capital punishment". In recognition of the significance that discharge from employment has on the individual grievor, the Board has imposed on a trade union responding to a duty of fair representation complaint which relates to a discharge an obligation to explain, in satisfactory terms, why it did not pursue the employee's grievance to arbitration. As was noted by the Board in *Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920, at para. 47, "while the legal burden in a section [69] complaint is on the individual complainant, once it is established that a union member has suffered the ultimate sanction of discharge, this Board expects a persuasive account from the union to justify its refusal to file a grievance, or having done so, to carry the grievance to arbitration".

34. The CAW considered the merits of the applicant's termination grievance by reviewing a copy of Canada Post's tracking of the recall notice, and considering the specific penalty of automatic termination in the collective agreement. However, the CAW did not properly consider the various possible interpretations to be given to the "delivery by registered mail of the notice". If it had done so it would have been apparent that one interpretation of the phrase is that the note is not delivered until the recipient signs for the registered mail.

35. The union's failure to consider the various possible interpretations of when delivery was effected was arbitrary and violated section 74 of the Act. The application is allowed in part. The CAW is directed to obtain a legal opinion regarding when "delivery" is effected given the language in the collective agreement which provides "delivery by registered mail of the notice". The CAW is

then directed to consider the legal opinion and again review the applicant's termination grievance and determine whether or not to take the grievance to arbitration. Should the CAW decide to take the applicant's grievance to arbitration, any time limitations within the collective agreement are waived.

2317-07-ES Ravindra Patel, Applicant v. **Welsh Industrial Manufacturing Inc.**, and Director of Employment Standards, Responding Parties

Discharge – Employment Standards – The employee applied for a review of the officer's refusal to award him termination pay – The Board found that the single outburst of profanity directed at a supervisor in this case did not warrant discharge without statutory notice or its monetary equivalent: the employee had an unblemished thirteen-year record with the employer; there was no specific rule or policy against the use of profanity in the workplace; the published policy of due process was not followed – Application allowed

BEFORE: *Patrick Kelly*, Vice-Chair.

APPEARANCES: *Ravindra Patel* appearing on his own behalf; *Jeff Robson* appearing for Welsh Industrial Manufacturing; no one appearing for the Director of Employment Standards.

DECISION OF THE BOARD; March 31, 2008

1. This is an employee application under the *Employment Standards Act, 2000*, S.O. 2000, c.41, as amended ("the Act") for review of a refusal to issue an Order to Pay.

Background

2. The Employment Standards Officer determined that Mr. Patel was not entitled to severance pay because the responding party company ("Welsh" or "the company") did not have a payroll of $2.5 million or greater. The Officer also determined that Mr. Patel was not entitled to termination pay because he engaged in wilful misconduct in that, by swearing at his employer, he was insubordinate in breach of an established workplace rule of which he was aware.

The Evidence

3. Jeff Robson, the company's Vice President, testified for Welsh. The applicant, Ravindra Patel, testified on his own behalf. Most of the material facts were not in dispute, but the few discrepancies there were in the testimony I describe below.

4. Welsh is a machine shop that makes components for various types of industry. It is jointly owned by Mr. Robson, his brother Dan Robson, and their father.

5. Mr. Patel was a machinist with the company since December 15, 1993 until his termination in December 2006. He was earning $21.25 per hour at the time. Mr. Robson

acknowledged in his evidence that Mr. Patel was a good worker, and that he had no record of discipline.[1]

6. On the morning of December 19, 2006, Mr. Robson arrived at the shop to discover that a Ministry of Labour inspector was about to inspect the workplace. Mr. Robson does not normally spend much time on the shop floor. His brother, Dan Robson, looks after the day-to-day operations. However, on this occasion, Mr. Robson accompanied the inspector on to the shop floor. Mr. Robson immediately noticed Mr. Patel working nearby, and he also testified that he noticed a skid containing parts sitting in an aisle near Mr. Patel. Mr. Robson became a little upset that the skid was blocking the aisle, and he pointed out to the inspector that this was not the norm, that the aisles were always kept clear. Apparently, the inspector was not concerned about the skid, and the inspection continued without incident.

7. Mr. Patel disputes that the skid was in the middle of the aisle, or that it was substantially blocking the aisle. He acknowledged, however, that the skid might have been a "little over the line".

8. After the inspection, Mr. Robson returned to Mr. Patel's area and asked why the skid of parts was in the middle of the aisle. According to Mr. Robson, Mr. Patel mumbled an unintelligible response. Mr. Robson then walked over to the shipping area and drove a forklift to the skid. He said he was frustrated, and that Mr. Patel was aware of his frustration. Mr. Robson told Mr. Patel to return to his work, and that he, Mr. Robson, would take care of the skid. He attempted to move the skid, but in doing so, he upset the container and the parts fell on to the floor.

9. The accident prompted disapproval from Mr. Patel. According to Mr. Robson, Mr. Patel said to him in the presence of another employee by the name of Milan, "You're a fucking idiot." Mr. Patel vigorously denied making such a statement. He testified that he told Mr. Robson, in the presence of a co-worker by the name of Dave, "That was a stupid thing to do."

10. Whatever Mr. Patel said to Mr. Robson, Mr. Robson was upset to be undermined by Mr. Patel in the presence of another employee. According to Mr. Robson, he said to Mr. Patel: "Get your stuff, get packed up, you're out of here, you're done". Mr. Patel testified that Mr. Robson told him to go home. In any event, Mr. Patel did not go quietly. He angrily responded, "Fuck you" at least twice, perhaps as many as five or six times.

11. Mr. Robson returned to his office. Upon reflection, he thought he should make sure that he had heard Mr. Patel correctly when he had referred to Mr. Robson as "a fucking idiot". He went out to the shop floor and spoke to Milan, who confirmed Mr. Robson's understanding.

12. Mr. Patel returned to work the next day. This surprised Mr. Robson, because he thought he had dismissed Mr. Patel. Nevertheless, he decided to see if Mr. Patel was contrite. He went to him on the shop floor and suggested they talk. Mr. Patel did not want to speak to Mr. Robson, he wanted to be left alone. However, he was soon persuaded to go with Mr. Robson to his office. They

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[1] Mr. Robson did tender a handwritten note dated May 7, 1998 from Mr. Patel's then supervisor to the company's human resources representative outlining the supervisor's concern that Mr. Patel might have quit his employment after having been laid off from a shift because of lack of work. Mr. Robson testified that the note was evidence of difficulties between Mr. Patel and the supervisor. Be that as it may, the note clearly is not a disciplinary warning, nor was it ever shared with Mr. Patel while he was employed.

talked. The meeting did not go well. It is not necessary to resolve the differences in the testimony of Mr. Robson and Mr. Patel with respect to what exactly was said. What is clear is that Mr. Robson decided that he no longer wanted to employ Mr. Patel, and he unequivocally advised Mr. Patel that he was being terminated for having been disrespectful to a supervisor.

13. A letter of termination followed. It stated:

> **December 21, 2006**
>
> **Mr. Ravi Patel**
>
> On December 19th, 2006 you were asked to leave the premises of Welsh Industrial Mfg. Inc. for the conduct of "insubordination".
>
> ***(Insubordination is classically defined as an employee's wilful disregard for a manager's direct orders. "Inappropriate language" can also constitute insubordination)***
>
> We at Welsh Industrial Mfg. do not tolerate this behavior, therefore you were immediately asked to leave the workplace. Please note that your actions and comments to me were witnessed by other employees/co-workers working in the area.
>
> The following day (December 20th) you returned to work. I (your supervisor) asked to speak with you, and your comment to me was "I'm not speaking to you". You were then asked to come into my office to discuss your behavior. While in my office your actions towards me (your supervisor) became abrupt and excited again. You did not feel any remorse for your actions that were conducted on December 19th. As our conversation progressed you were showing no signs of changing your behaviors [sic]. At that point I made my decision to dismiss you as an employee and to terminate your employment at Welsh Industrial Mfg. under the grounds for "disrespecting a supervisor" and "insubordination".
>
> Ravi, you will receive pay for all hours worked for December 18th to the 20th, plus all outstanding vacation pay owed to you for 2006.
>
> I regret that the situation occurred, however we have a zero tolerance for this conduct at Welsh Industrial Mfg. and we wish you all the best in your future endeavors.
>
> **Regards,**
> **Jeff Robson**
>
> "Jeff Robson"
>
> **Vice President / Secretary**
> **Welsh Industrial Mfg. Ltd.**

14. The company has a policy and procedures manual, which Mr. Patel acknowledged in writing in 1999 that he had read and understood. The company relied upon its policy on progressive discipline for terminating Mr. Patel without notice. It states:

PROGRESSIVE DISCIPLINE

Company discipline is progressive as it serves as a form of notice to any employee that the Company will not tolerate a certain behaviour or behaviour of a similar nature.

When improper behaviour continues, the employee will be given further discipline more severe in nature, the final step being termination of employment.

Steps in progressive disciplinary action:

1. *Verbal Warning*
2. *Written Warning*
3. *One Day Suspension*
4. *Three Day Suspension*
5. *Termination of Employment*

Before termination takes place it is mandatory that the owners be consulted.

Infractions such as insubordination, theft, damage of Company property, sexual harassment, and physical assault, may result in accelerated progressive discipline or discharge.

15. Mr. Robson contended that Mr. Patel was insubordinate, and that the company's policy clearly contemplates the possibility that a single act of insubordination may result in dismissal without the need to proceed through the other four steps of the disciplinary procedure.

Analysis and Conclusions

16. Generally, the Act requires employers to provide notice of termination or termination pay, and in certain circumstances, severance pay, to terminated employees.[2] However, one exemption to this requirement is in circumstances where the employee in question engages in wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.[3] The issue in this case is whether Mr. Patel falls within the parameters of this exemption, and specifically whether he was guilty of wilful misconduct.

17. There have been a number of decisions of the Board and of Referees over the last fifteen years dealing with the issue of profanity in the workplace. The results vary. Some have found in favour of employers, while about an equal number have concluded that swearing was not wilful misconduct. It all depends upon the unique facts and circumstances in each case.

18. Most, if not all of the decisions adopt a three-part test articulated by Referee Hunter back in 1982 in *General Motors of Canada Ltd.* (December 14, 1982 – E.S.C. 1337):

i. The profanity must be more than "shop talk";
ii. The employer's prohibition on profanity must be known; and
iii. Profanity justifying termination must be more than one isolated outburst.

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[2] See section 54 and section 64 of the Act.
[3] See paragraph 3 of subsection 2(1), and paragraph 6 of section 9, of *O.Reg 288/01* passed pursuant to the Act.

19. In *Central States Can of Canada Ltd. (Re)*, [1995] O.E.A.S.A.D No. 148 (December 5, 1995) it was not really necessary to apply the three-part test described above, because in addition to calling his supervisor a liar and "fucking asshole", the employee also physically attacked the supervisor. That behaviour clearly constituted wilful misconduct.

20. Similarly, in *Doss (Re)*, [1996] O.E.S.A.D. No. 265 (December 3, 1996), upon being informed of her suspension, the employee carried on in an emotionally hysterical and agitated state for two hours, refusing to leave the workplace, and repeatedly shouting profanities aimed at her supervisor as she was escorted out, but not before violently hurling a paper punch against the office wall, narrowly missing an individual. Obviously, this was a case that went beyond mere swearing, and the Adjudicator had little difficulty in finding wilful misconduct.

21. A case more on point is *Wal-Mart Canada Inc.*, [2003] O.E.S.A.D. No. 1288 (December 2, 2003). In that matter, in response to a reasonable request by his supervisor to complete a certain task, an employee refused the request and used profane language overheard by at least one customer of the employer. The Board found that the employee's response constituted wilful misconduct and wilful disobedience. However, there were three distinguishing facts in that case that are not present in this one. First, the employee had engaged in serious misconduct twelve months earlier, and had been warned that he risked termination in the event of further serious misbehaviour. Mr. Patel, however, was not a repeat offender. His record of discipline was completely unblemished. Secondly, the employer in the *Wal-Mart* case had a rule against the use of profanity in its policy handbook, which the employee had acknowledged reading and understanding. In the case before me, there was a clearly articulated policy about the disciplinary process which contemplated the possibility of immediate dismissal (after consultation between the owners) for certain serious acts of misconduct, such as insubordination. But no policy was brought to my attention specifically about profanity in the workplace. It is arguable that the use of profanity against a person in authority may, in certain circumstances, constitute insubordination, but Welsh's policy does not make this clear. The third distinguishing feature from the *Wal-Mart* decision is that Mr. Patel did not refuse a reasonable order of a person in authority.

22. In *Phillips Tool & Mould*, [2005] O.E.S.A.D. No. 473 (May 11, 2005), the employee had previously told the owner to "fuck off" and been verbally reprimanded concerning the inappropriateness of his comments. On the third occasion, the employee referred to the owner as, among other things, a "lying cocksucker". The Board found wilful misconduct and declined to order termination pay. Again, the instant case is distinguishable. Mr. Patel had no history of directing profane comments at his supervisor.

23. By way of contrast, I am not aware of any case resulting in a finding of wilful misconduct in which the misbehaviour involved only a single event of cursing at a supervisor, unaccompanied by other misdeeds or a previous disciplinary record: see, for example, *Coenaert (Re)*, [1992] O.E.S.A.D. No. 227 (April 30, 1993) *941017 Ontario Inc. (c.o.b. Crown and Thistle Pub*, [2001] O.E.S.A.D. No. 87 (February 23, 2001); and *Scarborotown Chrysler Dodge Jeep Ltd.*, [2005] O.E.S.A.D. No. 197 (March 9, 2005). Those cases describe momentary, one-time flare-ups involving swearing by employees at their supervisors. Such situations do not satisfy the third component of the test articulated in the *General Motors* case cited above.

24. Assuming, without deciding, that Mr. Patel called Mr. Robson a "fucking idiot", I find that in the circumstances of this case, it was not wilful misconduct. The fact that Mr. Patel went on to

swear at Mr. Robson after being sent home does not change my finding because it was all part and parcel of a single event. It was disrespectful to be sure. But it was a completely isolated incident in Mr. Patel's long career with Welsh. Moreover, there was no specific rule or policy against the use of profanity in the workplace. Mr. Patel was aware of the policy on progressive discipline, and he must be taken to be aware that a single act of insubordination might, in the appropriate circumstances, result in his immediate termination. However, the company's policy was not clear that swearing at a supervisor could amount to insubordination, and in any event, the policy contemplated a sort of "due process" whereby employees could expect not to be dismissed without the concurrence of all the owners of the company. The evidence did not disclose that Mr. Robson consulted with his brother or his father, the two other owners, prior to making his decision to terminate Mr. Patel.

25. In brief, then, the evidence failed to establish that Mr. Patel was aware of a company prohibition on the use of profanity, and it also failed to establish any prior misconduct by Mr. Patel that would cause the Board to characterize the confrontation with Mr. Robson as anything more than one isolated incident in Mr. Patel's long career with Welsh. For these reasons, I decline to find that Mr. Patel engaged in wilful misconduct. He is entitled to eight weeks' termination pay.

26. There was no evidence led to contradict the finding of the Employment Standards Officer that the company's payroll was less than $2.5 million, and therefore no basis upon which to order severance pay in this matter.[4]

Disposition

27. The application succeeds.

28. I order the responding party employer forthwith to pay in trust to the Director of Employment Standards eight weeks' termination pay, plus 4% vacation calculated on that amount, for distribution to the applicant. There was no evidence before me concerning Mr. Patel's weekly hours of work, or whether he had a regular work week. Therefore, in calculating the amount of the termination pay payable to Mr. Patel, the company is to take into account Mr. Patel's hourly rate of pay, $21.25, and to have regard to sections 61(1) and 61(1.1) of the Act.

29. If the company fails to pay the termination pay within fifteen days of the date of this decision, it is liable to pay the Director of Employment Standards an additional administrative fee of ten per cent of the amount ordered in the preceding paragraph.

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[4] See subsection 64(1) of the Act with respect to the criteria for establishing an entitlement to severance pay.

3166-07-R (Court File No. 08-0015) Edgewater Gardens Long Term Care Centre v. OLRB and OPSEU

Certification – Judicial Review – Representation Vote – Stay – The employer sought a stay of the Board's decisions ordering a vote and a ballot count – Request for stay dismissed – Reasons to follow

Court of Appeal for Ontario, Carpenter-Dunn, J., March 31, 2008

The Employer sought a stay of the Board's decisions ordering a vote and a ballot count – Request for stay dismissed – Reasons to follow

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0812-06-R (Court File No. C47489) Maystar General Contractors Inc. v. The International Union of Painters and Allied Trades, Local Union 1819 and Ontario Labour Relations Board

Certification – Construction Industry – Judicial Review – Mootness – Practice and Procedure – The Board certified the Painters' union in this card-based application when the employer failed to file a response in a timely fashion pursuant to s. 128.1(3) – In its request for reconsideration of the Board's decision certifying the union, the responding party relied on the fact that it had delivered its response to the union in a timely manner but, through inadvertence, had failed to file the response with the Board – Relying on *Air-Kool*, the Board held that it had no discretion to extend the time to accept the response – On judicial review, the court held the Board to a standard of correctness and found the Board had erred in interpreting s. 128.1(3) as a limit on its ability to accept a late filing – The word "shall" in the provision was a directory imperative, but aimed only at the employer, not the Board – Application for judicial review granted ([2007] OLRB Rep. Mar/Apr 459) – Subsequent to the Divisional Court determining the Board had discretion to consider late-filed information pursuant to s. 128.1(3)), the Board reconsidered and revoked the certificate issued to the union and set the matter down for a Regional Certification meeting as it was unable to determine the number of employees in the bargaining unit – The Court of Appeal found these post-judicial review events rendered the matter before it moot, because the underlying controversy (whether the Board can consider and act on the information) had already been acted upon by the Board – The Court also decided not to exercise its discretion to decide the moot appeal on the merits because a) an adversarial context still existed; and b) while the issues (standard of review and interpretation of the s. 128.1) are important, they do not raise questions of broad social and constitutional importance, and they are not evasive of review – Finally the court cautioned that the decision was not an affirmation of Divisional Court's finding that the appropriate standard of review was correctness – The court made it clear that deference was owed to the Board on these types of issues – Appeal dismissed

Court of Appeal for Ontario, Doherty, Gillese and *Epstein JJ.A.*, April 11, 2008

OVERVIEW

[1] The union brought a certification application before the Ontario Labour Relations Board. The employer prepared a response in which it challenged the identity and numbers of persons in the proposed bargaining unit. It served the response on the union but, through inadvertence, neglected to file its response with the Board within the two-day statutory time limit. Consequently, based solely on the information provided by the union, the Board made the requested certification order.

[2] The employer asked the Board for an extension of time in which to file its response and for a reconsideration. The Board undertook a reconsideration. However, relying on a prior Board decision which held that the Board had no authority to extend a time limit set out in s. 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, Sch. A (the "*LRA*"), the Board did not consider the employer's response. It affirmed the certification order.

[3] The employer brought an application for judicial review which the Divisional Court granted. The Divisional Court applied a standard of correctness to the Board decision and held that the Board had erred in concluding that it had no jurisdiction to consider late filed material. It remitted the matter to the Board for reconsideration in light of its reasons.

[4] The union obtained leave to appeal the Divisional Court order. Before the appeal was heard, the Board implemented the Divisional Court order, considered the employer's information and rescinded the certification order. For the reasons that follow, I would dismiss the appeal as moot.

BACKGROUND

Board Certification

[5] On June 13, 2006, the International Union of Painters and Allied Trades ("the Union") brought an application for certification pursuant to s. 128.1 of the *LRA*. The application to the Ontario Labour Relations Board ("the Board") was made in respect of all "glaziers and glazier apprentices" employed by Maystar General Contractors Inc. ("Maystar"). The application stated that, as of that date, there were two employees in the proposed province-wide bargaining unit working at a Maystar jobsite in Oshawa.

[6] On June 15, 2006, Maystar faxed its response to the Union. In its response, Maystar contended that the two glaziers were contractors and not employees for the purposes of the *LRA*. Alternatively, if the two workers were found to be employees, then Maystar contended that it had eight such employees on four different job sites on June 13, 2006.[1]

[7] Through inadvertence, Maystar's response was not provided to the Board.

[8] Section 128.1(3) of the *LRA* stipulates that an employer is to provide its response to a certification application to the Board within two days after receiving notice of the application.

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[1] The number of employees is significant, among other things, pursuant to s. 128.1(7) the Board "shall dismiss the application if it is satisfied that fewer than 40 per cent of the employees in the bargaining unit are members of the trade union on the date the application is filed."

[9] On June 19, 2006, the Board certified the Union as the bargaining agent for a unit of glaziers. The Board decision noted that, although duly served with notice of the application, Maystar had filed no response.

[10] On reading the Board decision, Maystar discovered that the Board had not received its response. On June 26, 2006, it sought a reconsideration of the certification decision. In its request for reconsideration, Maystar explained that its response had been supplied to the Union within the two days required by s. 128.1(3) but "through administrative error", it had not been filed with the Board at the same time. Maystar asked that the time for filing material be extended.

[11] On September 6, 2006, the Board denied Maystar's request, confirmed its certification decision and granted the certificates to the Union (the "Board Decision").[2] In refusing to consider Maystar's response, the Board followed *Air Kool Ltd.* (2005), 115 C.L.R.B.R. (2d) 261 and held that it had no authority to consider the Maystar information because it had been filed outside the two-day limit in s. 128.1(3).

The Divisional Court Decision

[12] Maystar brought an application for judicial review of the Board Decision.

[13] The Divisional Court held that a standard of correctness applied to the Board Decision. It concluded that the Board had incorrectly interpreted s. 128.1(3). It was of the view that the Board had the power to consider late-filed material. In an order dated March 20, 2007, the Divisional Court allowed the application, set aside the Board Decision and remitted the matter for reconsideration in accordance with its reasons (the "Order").

Events after the Divisional Court Decision

[14] On March 26, 2007, pursuant to the Order, the Board began the process of reconsidering the certification application. After noting that it had the Union application and Maystar's response, it set a schedule for receiving further submissions.

[15] On April 4, 2007, the Union filed its notice of application for leave to appeal the Order to this court.

[16] On April 26, 2007, the Union asked the Board to adjourn the reconsideration proceedings until its leave application had been heard. Maystar opposed the adjournment, stating that if the Union wished to have a stay of the Order, it ought to bring a stay motion to this court. The Board declined to adjourn the reconsideration proceedings. No stay application was ever made to this court.

[17] On June 28, 2007, while the leave application was outstanding, the Board reconsidered the certification application. The Board determined that it should exercise its discretion and permit the late filing of Maystar's response. On the basis of the application filed by the Union and Maystar's response, the Board was not able to determine the percentage of employees in the bargaining unit who were members of the Union as of the date that the certification application had been filed. The Board ruled that the matter would be determined following a regional certification meeting. The Board

[2] The certificates were amended to correct an error that is irrelevant to the matters in issue on this appeal.

revoked the certificates granted to the Union on September 6, 2006, and referred the matter for a regional certification meeting.

[18] On July 25, 2007, a labour relations officer held the regional certification meeting and prepared a report. The report included the names of ten employees – the two originally named in the Union application and the eight named in Maystar's response. All ten were disputed. On the same date, the parties agreed to adjourn any further steps in the certification proceeding.

[19] For ease of reference, the matters described in paras. 14 – 18 will be referred to as the "Events".

[20] On July 26, 2007, this court granted leave to appeal. The court was unaware of the Events. [3]

[21] On July 30, 2007, the Union filed its notice of appeal.

[22] The factums filed by the parties did not allude to the Events. However, additional materials filed before the oral hearing of the appeal alerted the court to what had transpired. That information caused the court to query whether the appeal was moot. The Union argued it was not and, if it were, that the court ought to exercise its discretion and decide the appeal on its merits. Maystar argued that the appeal was moot and ought not to be heard. After hearing argument on the issue of mootness, the court reserved on the matter until after it had heard the parties on the merits of the appeal.

THE ISSUES

[23] As I have concluded that the court ought not to decide the appeal on the merits, these reasons need address only two issues. First, is the appeal moot? Second, if it is, ought the court to exercise its discretion and decide the appeal?

ANALYSIS

[24] *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (S.C.C.), [1989] 1 S.C.R. 342 is the seminal case on the doctrine of mootness. In *Borowski* at 353, Sopinka J. explains the doctrine in the following terms:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or

[3] Without ascribing fault to anyone, I wish to observe that the court should have been ifnormed of the Events as soon as the parties were aware of them so that the information could have been considered when the leave application was decided.

> proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice.

[25] This court revisited the doctrine of mootness more recently in *Tamil Co-operative Homes Inc. v. Arulappah* 2000 CanLII 5726 (ON C.A.), (2000), 49 O.R. (3d) 566. In *Tamil Co-operative* at para. 13, Doherty J.A., writing for the court, describes the approach the court is to take when deciding the question of mootness:

> Courts exist to resolve real disputes between parties and not to provide opinions in response to hypothetical or academic problems. Courts will, however, on occasion address the merits of an appeal even where the dispute giving rise to the appeal has dissolved. Where a question of mootness is raised, the court must first decide whether the appeal is moot. If the appeal is moot, the court must then decide whether it should nonetheless hear the merits of the appeal. The discretion to hear a moot appeal is intended to address those exceptional cases where the circumstances are such that the general rule against hearing appeals where there is no live controversy between the parties should not be followed ...

[26] As a general rule, the court will not decide moot cases.[4]

Is the appeal moot?

[27] In the first stage of analysis, the court must determine whether the appeal is moot. Making that determination in this case requires a consideration of whether, after the Events, a live controversy remains: see *Borowski* at 354. If not, the appeal is moot.

[28] The controversy that drives this appeal is whether the Board can consider the information proffered by Maystar. The Board decision of June 28, 2007 makes it clear that not only has the Board determined that it can consider the information but that the Board has, in fact, considered it and acted on it. It was as a result of Maystar's response, in conjunction with the Union application, that the Board revoked the certificates it had granted to the Union. Thus, a decision of this court on the merits of the appeal would have no practical effect. Viewing the matter substantively, the controversy this court is asked to resolve on the appeal has been overtaken by the post-judicial review events, in particular, the subsequent orders of the Board.

[29] A more technical analysis also compels the conclusion that the appeal is moot. The Union asked the court to set aside the Divisional Court order and restore the Board's decision certifying the Union. However, this court cannot restore the Board Decision for three reasons. First, the Board Decision is no longer the operative order in this ongoing certification battle, as it has been supplanted by the later Board decisions. Second, reinstatement of the certification order is no longer possible because the Board revoked the certification by means of its June 28, 2007 decision. Third, the Board decision of June 28, 2007, is not before us. Therefore, it would be improper to effectively overturn that decision, which is what restoration of the Board Decision would accomplish.

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[4] *New Brunswick (Minister of Health and Community Services) v. G.(J)*, [1999] 3 S.C.R. 46 at para. 41.

[30] The Union also argues that were this court to set aside the Divisional Court order, the Union could go back to the Board and invite it to reconsider its decision of June 2007 in which it revoked the certification. The Union submits that armed with a favourable decision from this court, it would ask the Board to restore the certification order made in 2006. Given the material now before the Board and the post-judicial review events, it is not clear that setting aside the Divisional Court order would lead to such a reconsideration. The Events have clarified the nature of the dispute between the Union and Maystar such that the procedural issues that arise in respect of s. 128.1(3) may no longer govern the outcome. The Board now knows there is a real issue concerning the Union's right to certification. It is difficult to see the Board ignoring the real controversy and restoring an order which been made in the absence of such knowledge.

[31] In summary, the appeal is moot because the relief sought by the Union is no longer available and because the Events have reshaped the dispute between the parties such that the issue this court is asked to decide is not determinative of that dispute.

Ought the Court to exercise its discretion and decide the appeal?

[32] Having concluded that the appeal is moot, the second stage of analysis requires a determination as to whether, nonetheless, the court should decide the appeal on its merits. At this stage of the analysis, the onus rests on the appellant to demonstrate why the court should depart from its usual practice of refusing to hear moot appeals: *Tamil Co-operative* at para. 17.

[33] After stating that the court's discretion is not to be fettered by the rigid application of pre-determined criteria, Sopinka J. in *Borowski* identified three factors for the courts to consider when determining whether to exercise discretion to hear a moot case:

> (1) the presence of an adversarial context,
> (2) the concern for judicial economy, and
> (3) the need for the court to be sensitive to its role as the adjudicative branch in our political framework.[5]

In exercising its discretion, the court is to consider the extent to which each of the three factors is present, recognizing that the ultimate determination is not a mechanical process.[6]

[34] I am satisfied that the first factor – an appropriate adversarial context – exists in this case. The litigants have continued to argue their respective positions vigourously.

[35] The second factor relates to a concern for conserving scarce judicial resources. In deciding whether an expenditure of judicial resources is warranted, the court is to consider the importance of the issues raised and whether the issues are "evasive of review": see *Borowski* at 360, *New Brunswick* at para. 45 and *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII), [2003] 3 S.C.R. 3 at para. 20.

[36] This appeal raises two issues. The first is whether the Divisional Court erred in applying a standard of review of correctness to the Board Decision. The second is whether the Divisional Court

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[5] At 358 – 62. See also *New Brunswick, supra* at para. 43.
[6] *Borowski* at 363.

erred in holding that the Board's interpretation of s. 128.1(3) of the *LRA* was incorrect (the "Procedural Issue").

[37] There is no question but that both issues are important. However, the importance of the legal issues is not determinative of the matter. As Doherty J. A. explains in *Tamil Co-operative* at para. 24:

> The importance of a legal issue raised in a proceeding is a relevant consideration in determining whether a court should hear a moot appeal. It is not, however, determinative. There are an almost infinite number of important legal issues lurking in the myriad of rules and regulations governing the citizenry upon which those interested in the issue would appreciate the opinion of an appellate court. If the importance of a legal issue is enough to overcome concerns associated with hearing moot appeals, the doctrine has little value. It means no more than that the court should not waste its time and resources deciding unimportant legal issues in cases where there is no longer a live dispute between the parties. This would seem self-evident.

[38] Moreover, the issues are not of public importance in the way in which that phrase has been understood in this area. This factor requires a consideration of the public importance in resolving the issues raised on appeal, a consideration related to the social cost of continued uncertainty in the law. As discussed in *Tamil Co-operative* at para. 26, the cases which meet this criterion have generally addressed questions of broad social and constitutional importance. While the matters in issue in this appeal are important, they do not raise questions of that sort.

[39] Further, neither issue raised on appeal is "evasive of review". Generally, a matter is evasive of review if it is unlikely that the court will encounter it again or if it tends to be moot by the time it reaches the reviewing court. One example of this type of matter is that given in *New Brunswick* at para. 47: an interlocutory injunction prohibiting certain strike action. The certification provisions in question are relatively new, having only come into effect on June 13, 2005. It stands to reason that the Board will make many decisions that involve those provisions and that the procedures the Board follows in arriving at those decisions will be scrutinized through the judicial review process; hence, the Procedural Issue will be addressed. There is no question but that the issue of the standard of review to be applied to Board decisions in respect of those provisions will be revisited in those judicial review proceedings. Thus, I do not see the issues as evasive of review.

[40] The third factor to be considered in relation to mootness is the need for the court to be sensitive to its role as the adjudicative branch in our political framework. A court may decline to hear a moot case where it would require "departing from its traditional role as an adjudicator [or] intruding upon the legislative or executive sphere: *Doucet-Boudreau* at para. 22. This concern does not arise in the present case.

[41] Accordingly, I would decline to exercise the court's discretion to decide the appeal on the merits.

[42] I conclude, however, with the following caution. Nothing in these reasons should be taken as affirming the Divisional Court's view that the appropriate standard of review of the Board Decision was correctness and that no deference was owed to the Board in its interpretation of the

relevant certification provisions in the *LRA*. The decisions of the Supreme Court of Canada, over the course of many decades, show an unbroken commitment to affording labour relations boards the highest levels of judicial deference on matters within their exclusive jurisdiction. See, for example, *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (S.C.C.), [1979] 2 S.C.R. 227, *Canada (Attorney General) v. Public Service Alliance of Canada*, 1993 CanLII 125 (S.C.C.), [1993] 1 S.C.R. 941 and *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369.[7] Issues which arise in implementing the *LRA* provisions governing the certification process in the construction industry are such matters.

[43] In the nomenclature of old, Board decisions were not to be set aside unless they were patently unreasonable or clearly irrational. *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, has simplified the standard of review analysis with the result that there are now only two standards of review: correctness and reasonableness. However, both the result and the reasoning in *Dunsmuir* affirm a continuing stance of deference in the field of labour relations. In *Dunsmuir*, a standard of reasonableness was held to apply when reviewing the decision of an adjudicator made under the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25. The majority in *Dunsmuir* notes that an exhaustive analysis is not required in every case to determine the proper standard of review: if the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded a decision maker with regard to a particular category of question, the search for the appropriate standard is over. If not, then the usual factors are to be considered. Deference will "usually result" where a decision maker is interpreting its own statute, with which it will have particular familiarity. Deference is also warranted where the decision maker has particular expertise in the application of legal rules in a specific statutory context. The majority also noted that a question of law of central importance to the legal system as a whole and which is outside the specialized area of expertise of the decision maker will always attract a correctness standard. I do not see the Procedural Issue as raising a question of that nature.

[44] Appreciating the need for deference on matters within the Board's exclusive jurisdiction further militates against deciding the present appeal on the merits. A decision on the Procedural Issue would require the court to analyze what appear to be two competing lines of Board authority and to perhaps accept one and reject the other.[8] If nothing else, it would be foolhardy for this court to pre-emptively interpret complicated statutory provisions involving practices and procedures of which the court knows very little, before the Board has an opportunity to consider and, perhaps, reconcile those authorities. To embark on a review of the merits would require this court to do precisely what the jurisprudence indicates is improper – rather than defer to the Board, it would have this court dictate the process the Board is to follow when making decisions on certification, a matter within its exclusive jurisdiction.

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[7] The deferential stance extends broadly to those in the labour field in general: see *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 and *Ivanhoe Inc. v. UFCW Local 500*, [2001] 2 S.C.R. 565.

[8] The question is whether the Board may consider an untimely response to a certification application brought under s. 128.1. The *Air Kool* line of cases holds that the *LRA* imposes a mandatory time limit and obligates the Board to make its determination of the basis of only the information provided in the application and any response filed within the time lines dictated by the *LRA*. The *Easton* line of cases holds that the time limits are directory in certain circumstances and that late filed materials may be considered: *Easton's Group of Hotels Inc.*, [2006] O.L.R.D. No. 2940 (August 9, 2006).

DISPOSITION

[45] I would dismiss the appeal as moot. If the parties are unable to agree on costs, they may make brief written submissions on the matter within twenty-one days of the date of release of these reasons.

1271-03-U; 1336-03-M; 1414-030M (Court File No. 32452) Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 444, Great Blue Heron Gaming Company, Ontario Labour Relations Board, Attorney General of Canada and Attorney General of Ontario

Constitutional Law – Interim Relief – Intervenor – Judicial Review – Reference – Unfair Labour Practice – Application for leave to appeal to Supreme Court of Canada was dismissed. Board decisions reported at [2003] OLRB Rep. Nov/Dec 1035 and [2004] OLRB Rep. Nov/Dec 1077; Divisional Court decision reported at [2006] OLRB Rep. May/June 450; Court of Appeal decision reported at [2007] OLRB Rep. Nov/Dec 1197.

Supreme Court of Canada, Binnie, LeBel and *Deschamps JJ.*, April 24, 2008

The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number C46210, 2007 ONCA 814, dated November 27, 2007, is dismissed with costs to the respondents National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 444 and Attorney General for Canada.

1838-05-U; 2644-05-U (Court File No. 78978) Gus Nedelkopoulos v. A.G.S. Automotive Oshawa, C.A.W. Local 222 and Ontario Labour Relations Board

Duty of Fair Representation – Judicial Review – Practice and Procedure – Unfair Labour Practice – The court held that it is not the function of the Board, in determining a duty of fair representation complaint, to review the merits of an arbitration award or the procedural decisions that the arbitrator made – The Board had no jurisdiction to determine whether the Employer violated the collective agreement or other statutes governing the employment relationship – The decision not to allow the Board proceedings to be recorded is within the Board's discretion pursuant to s. 110(16) provided it gives full opportunity to the parties to present their evidence and to make submissions – The Board did not act improperly or offend the rules of procedural fairness when it refused to permit the reporter – The Board was reasonable in directing that the applicant seek leave of the Board prior to bringing another s. 74 complaint against the Union – The conclusion that the repeated allegations of s. 74 violations against the Union had become an abuse of process was reasonably made in an effort to control the Board's process – Application for Judicial Review dismissed

Superior Court of Justice (Divisional Court), Swinton, Donohue and *Hambly JJ.*, April 16, 2008

SWINTON J.:

[1] The applicant, Gus Nedelkopoulos, has brought an application for judicial review of a decision of the Ontario Labour Relations Board (the "Board") dated February 9, 2006, which dismissed his complaint that the respondent C.A.W. Local 222 (the "Union") had breached its duty of fair representation.

Background Facts

[2] The applicant is an asthmatic. He was employed by the respondent A.G.S. Automotive Oshawa (the "Employer"), a manufacturer of automobile parts, from August, 1985 until October, 1999, when he had to take sick leave because his medical condition was aggravated by irritants in the workplace. He ceased active employment on March 19, 2000.

[3] These have been disputes between the applicant and the Employer with respect to sickness and accident benefits and his ability to return to work with appropriate accommodation. Through 2000 and 2001, the applicant filed three grievances concerning the Employer's refusal to continue paying sickness and accident benefits, the Employer's denial of accommodation and the Employer's refusal to allow him to return to work.

[4] On December 17, 2001, the Union and the Employer concluded Minutes of Settlement respecting the three grievances. They agreed that an Independent Medical Examination ("IME") would be obtained to determine whether the applicant could be accommodated in the workplace. Disputes about the interpretation of the IME were to be determined through arbitration.

[5] The Employer and the Union did not agree upon an Independent Medical Examiner, and so the matter was referred to arbitration. The applicant attended the arbitration hearing with another Union member, who acted as his advisor during the hearing.

[6] After a six day hearing, the arbitrator issued an award dated August 18, 2005. He found that the Union had agreed to use Dr. Bob Neville as the Independent Medical Examiner, even though Dr. Neville had performed medicals for the Employer in the past. After considering the evidence from Dr. Neville as well as the applicant's physicians, the arbitrator concluded that the Employer had no position where the applicant could be accommodated without undue hardship, and he dismissed the grievances.

The Proceedings Before the Board

[7] The applicant brought two complaints pursuant to s.96 of the Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A (the "Act"), alleging that the Union had violated s.74 of the Act. The provision imposes a duty of fair representation on a union, requiring that it not act "in a manner that is arbitrary, discriminatory or in bad faith" in the representation of employees in a unit for which it has bargaining rights.

[8] In this case, the Board held a consultation to deal with the complaints, in accordance with the Act and the board's rules and practices. Pursuant to s.99(3) of the Act, the Board is not required to hold a hearing to determine a duty of fair representation complaint. Pursuant to s.99(5), the Board

may make any final order that it considers appropriate after "consulting with the parties". The applicant attended the consultation with another Union member, who acted as his personal advisor.

[9] The Board issued it sdecision and reasons on February 9, 2006, in which it dismissed the complaints. The Board concluded that the dispute about whether the report of Dr. Neville was an IME was not central to the outcome of the arbitration. Rather, the central issue at arbitration, and the issue on which the Union had focussed its attention, was whether the applicant's disability could be accommodated by the Employer without undue hardship. The Board observed that the Union challenged Dr. Neville's evidence during the arbitration, using the opinions expressed by the applicant's and Union's medical expert. The Board also concluded that the applicant and his personal representative, in large measure, determined how the Union's case would be presented to the arbitrator. However, the arbitrator determined, on the basis of all the evidence, including that of the applicant's own medical expert, that the applicant could not be accommodated in the workplace without undue hardship to the Employer.

[10] After considering these facts, the Board concluded that the Union did not violate the Act in its representation of the applicant at the arbitration.

[11] The Board also held that the Union did not act improperly in deciding not to arbitrate a new grievance in which the applicant sought to rely on a further medical report of his physician, given that the arbitrator had already evaluated that physician's evidence during the arbitration.

[12] Moreover, the Board held that the Union did not act imporoperly in declining to process other grievances in which the applicant protested that his employment had been terminated, given that both the Union and the Employer considered that the applicant had not in fact been terminated.

The Standard of Review

[13] At the time the parties prepared their materials for this application for judicial review, it was well established that the standard of review to be applied to the Board's determination of a duty of fair representation complaint was patent unreasonableness (see, for example, Verreault v. Ontario (Labour Relations Board), [2007] O.J. No. 2507 (Div. Ct.)).

[14] On March 7, 2008, the Supreme Court of Canada released its decision in Dunsmuir v. New Brunswick, 2008 SCC 9, in which it abolished the standard of patent unreasonableness and correctness (at paras. 34 and 45).

[15] The Court then explained that the reasonableness standard is a deferential one, stating:

> Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a adecision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[16] The Court went on to explain how to determine the appropriate standard of review. The existence of a privative clause is a strong indication of deference pursuant to the reasonableness standard (at para. 52). Moreover, where the tribunal is determining questions of mixed fact and law and when it is interpreting its own statute, deference will usually be accorded (at paras. 53-54).

[17] In the present case, the appropriate standard is reasonableness. The Board is protected by two strong privative clauses in ss. 114 and 116 of the Act. Moreover, it is applying s. 74 of its own Act to the particular facts of this case. Therefore, its determinations are deserving of deference, given the particular expertise of the Board in matters of labour relations.

Is the Board's Decision Reasonable?

[18] The applicant argues that the Board's decision cannot stand because it failed to deal with the issue of the Union's consent to have Dr. Neville act as an Independent Medical Examiner. He submits that this decision was made in bad faith by the Union. As well, he argues that the Board's decision was unreasonable, because it did not deal with the failure to accord him an IME, as required by the collective agreement and the Minutes of Settlement. As well, there was unfairness because the Board failed to deal with the unfairness of the proceeding efore the arbitrator, where he was not allowed to have a reporter present or to be represented by separate counsel.

[19] The Board held that it was not necessary to determine whether the Union had agreed to Dr. Neville's role (a fact that the Union disputed), since the main issue between the applicant and his Employer was his right to return to work. That issue was determined in the course of a multi-day arbitration in which the applicant and his representative actively participated, and in which the arbitrator heard evidence both form Dr. Neville and the applicant's physicians.

[20] The Board ultimately determined that the Union did not breach its duty of fair representation to the applicant. Given the evidence regarding the arbitration hearing, including the Union's challenge to Dr. Neville's evidence, that was a reasonable conclusion for the Board to reach.

[21] In effect, the applicant is taking issue with the conclusions in the arbitration award. However, it is not the function of the Board, in determining a duty of fair representation complaint, to review the merits of an arbitration award or the procedural decisions that the arbitrator made (in this case, refusing to allow a reporter or separate legal representation for the applicant). Similarly, the Board has no jurisdiction to determine whether the Employer violated the collective agreement or other statutes governing the employment relationship, as the applicant asserts.

[22] The applicant also complained of the Board's refusal to allow him to have a reporter present to record the proceedings. That decision was within the Board's discretion, given that s.110(16) of the Act allows the Board to determine its own practice and procedure, provided that it gives full opportunity to the parties to present their evidence and to make submissions. Through the course of the consultation, the applicant was able to present his position. The Board did not act improperly, nor did it offend the rules of procedural fairness, when it refused to permit the applicant to have a reporter present.

[23] Finally, the applicant takes issue with the Board's order that he not bring any further duty of fair representation complaints arising from the subject matter addressed in the arbitration award without leave of the Board. This order was made by the Board because of the number of duty of fair

representation complaints which the applicant had brought. In the Board's view, these allegations had becopme an abuse of process (Reasons, para. 26).

[24] This conclusion was one that the Board could reasonably reach, given the record of the past and current complaints. The order of the Board was reasonably made in an effort to control its process.

Conclusion

[25] For these reasons, the application for judicial review is dismissed. The Board and the Union do not seek costs, and none are awarded. Costs to the employer are fixed at $2,500.00 payable by the applicant.

CASE LISTINGS FEBRUARY 2008

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 2008

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3164-06-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Presot Muccini Urban Management Group Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Presot Muccini Urban Management Group Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all painters and painters' apprentices in the employ of Presot Muccini Urban Management Group Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) *(Clarity Note)*

4169-06-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Paradigm Mechanical Incorporated (Respondent)

Unit: "all plumbers and plumbers' apprentices and all steamfitters and steamfitters' apprentices in the employ of Paradigm Mechanical Incorporated in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all plumbers and plumbers' apprentices and all steamfitters and steamfitters' apprentices in the employ of Paradigm Mechanical Incorporated in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, Elgin, Brant and Wellington, that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (46 employees in unit)

0989-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. H.V.M. Holdings Inc. (Respondent)

Unit: "all construction labourers in the employ of H.V.M. Holdings Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all construction labourers in the employ of H.V.M. Holdings Inc. in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non- working foreman" (5 employees in unit)

1021-07-R: United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. H.V.M. Holdings Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of H.V.M. Holdings Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of H.V.M. Holdings Inc. in all sectors of the construction industry in that portion of the

District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1032-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sheridan Seating Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Sheridan Seating Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Sheridan Seating Inc. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1203-07-R: Labourers' International Union of North America, Local 527 (Applicant) v. Broccolini Construction (Ontario) Inc. (Respondent)

Unit: "all construction labourers in the employ of Broccolini Construction (Ontario) Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all construction labourers in the employ of Broccolini Construction (Ontario) Inc. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (0 employees in unit)

1536-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Madison Homes Limited and/or Madison Homes Holdings Ltd. and/or Madison Homes Cornell Limited and/or Madison Bathurst Limited and/or Madison Greensborough Limited and/or Madison Homes (Respondent)

Unit: "all construction labourers in the employ of Madison Homes Limited and/or Madison Homes Holdings Ltd. and/or Madison Homes Cornell Limited and/or Madison Bathurst Limited and/or Madison Greensborough Limited and/or Madison Homes in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2234-07-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Middlesex Drywall Ltd., Niekohr Holdings Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Middlesex Drywall Ltd., Niekohr Holdings Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all painters and painters' apprentices in the employ of Middlesex Drywall Ltd., Niekohr Holdings Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit) *(Clarity Note)*

3443-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Real Stucco Inc. (Respondent)

Unit: "all construction labourers, carpenters, carpenters' apprentices, painters and painters' apprentices in the employ of Real Stucco Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (5 employees in unit)

3505-07-R: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Belmont Glass Mirror & Aluminum Inc. (Respondent)

Unit: "all glaziers, glaziers' apprentices and metal mechanics in the employ of Belmont Glass Mirror & Aluminum Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all glaziers, glaziers' apprentices and metal mechanics in the employ of Belmont Glass Mirror & Aluminum Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

3518-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aracon Construction Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Aracon Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Aracon Construction Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3519-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. T&C Carpentry Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of T & C Carpentry Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of T & C Carpentry Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Bargaining Agents Certified Subsequent to Vote

4141-06-R: UNITE HERE (Applicant) v. Sunnybrook Health Sciences Centre (Respondent)

Unit: "all Maitre d's employed by Sunnybrook Health Sciences Centre at the Estates of Sunnybrook (McLean House and Vaughan Estate), save and except supervisors and persons above the rank of supervisor" (3 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0151-07-R: Service Employees International Union Local 2.ON, Brewery, General and Professional Workers' Union (Applicant) v. OLG Casino Brantford (Respondent)

Unit: "all Table Games Inspectors (formerly Floor Supervisors) employed by OLG Casino Brantford in the City of Brantford" (118 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	118
Number of persons who cast ballots	00
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	99
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	20
Number of ballots segregated and not counted	50

0318-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. The Kaitlin Group Ltd. (Respondent) v. Allied Construction Employees Local 1030, United Brotherhood Of Carpenters And Joiners Of America (Intervener)

Unit: "all construction labourers in the employ of The Kaitlin Group Ltd. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

2720-07-R: Teamsters Local Union No. 419 (Applicant) v. Versacold Group (Respondent)

Unit: "all employees of Versacold Group employed as drivers, including dependent contractors, working at and out of the City of Brampton, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and those employees covered under a subsisting collective agreement" (20 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names	1

appear on voter's list	
Number of segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	2

3106-07-R: Teamsters Local Union No. 938 (Applicant) v. Mackie Transport Limited (Respondent)

Unit: "all employees of Mackie Transport Limited working in and out of Gormley and Mississauga in the Province of Ontario, save and except supervisors, persons above the rank of supervisor, dispatchers, technicians, office and sales staff" (13 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

3147-07-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Sears Canada Inc. (Respondent)

Unit: "all employees of Sears Canada Inc., at its Vaughan Logistics Centre, in the City of Vaughan, save and except team leaders and persons above the rank of team leader, resource protection employees, office, clerical, technical staff and the human resource department. Clarity Note: For greater clarity it is agreed that the terms office, clerical and technical staff include but are not limited to, systems administrator, co-ordinator, I.T. and print shop staff, parts and service technician positions. In addition and for greater clarity the employees of Cantrex Group Inc., S.L.H. Transport Inc. and Excel Direct Inc., who perform work in the City of Vaughan are not included in the proposed bargaining unit." (625 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	669
Number of persons who cast ballots	51
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	511
Number of segregated ballots cast by persons whose names appear on voter's list	39
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	321
Number of ballots marked against applicant	187
Number of ballots segregated and not counted	39

3186-07-R: Ontario Public Service Employees Union (Applicant) v. Anago (Non) Residential Resources Inc. (Respondent) v. International Association of Machinists and Aerospace Workers (Intervener)

Unit: "all developmental and youth services employees of Anago (Non) Residential Resources Inc., in the County of Middlesex, East Middlesex and Huron County, save and except supervisors, persons above the rank of supervisor, administration staff, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of January 14, 2008" (101 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	108
Number of persons who cast ballots	71
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	71
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	58
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	0

3200-07-R: Ontario Nurses' Association (Applicant) v. VON Canada Ontario Branch, North Bay-Huntsville (Respondent)

Unit: "all registered nurses and nurses with Temporary Certificate of Registration engaged in a nursing capacity at the VON Canada Ontario Branch, North Bay-Huntsville office site, save and except managers, persons above the rank of manager, Registered Practical Nurses and employees covered by a subsisting collective agreement" (13 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3236-07-R: Canadian Construction Workers' Union (Applicant) v. Hurley Corporation (Respondent)

Unit: "all employees of Hurley Corporation engaged in janitorial cleaning and maintenance work at 3500 Steeles Ave. East, in the City of Markham, save and except shift supervisors and persons above the rank of shift supervisor" (24 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	22

Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3254-07-R: International Association of Machinists and Aerospace Workers (Applicant) v. Royal Equator Inc. o/a Crowne Plaza Toronto Airport (Respondent)

Unit: "all maintenance, security and front desk, (including swithchboard, reservations and night audit) employees of Royal Equator Inc. o/a Crowne Plaza Toronto Airport, at 33 Carlson Court, Toronto, Ontario, save and except supervisors and persons above the rank of supervisor" (25 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

3276-07-R: Ontario Public Service Employees Union (Applicant) v. United Counties of Leeds and Grenville - Maple View Lodge (Respondent)

Unit: "all employees of the United Counties of Leeds and Grenville employed in the Maple View Lodge Division, in the United Counties of Leeds and Grenville, save and except supervisors, persons above the rank of supervisor, Registered Nurses, office and clerical staff and students" (45 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	62
Number of persons who cast ballots	56
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	42
Number of segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	29
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	14

3302-07-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Vitafoam Products Canada Limited (Respondent)

Unit: "all maintenance department employees of Vitafoam Products Canada Ltd. in the City of Toronto, save and except foreperson, persons above the rank of foreperson, office and sales staff and those employees covered by a subsisting collective agreement" (8 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9

Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

3374-07-R: Canadian Union of Public Employees (Applicant) v. Université d'Ottawa/University of Ottawa (Respondent)

Unit: "all employees of Université d'Ottawa/University of Ottawa in the City of Ottawa employed as life guards, head guards and swim instructors, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for whom any trade union held bargaining rights as of January 31, 2008" (33 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

3381-07-R: Canadian Union of Public Employees (Applicant) v. The Primate's World Relief and Development Fund (Respondent)

Unit: "all employees of The Primate's World Relief and Development Fund in the City of Toronto save and except Team Leaders and the Executive Director and persons above the rank of Team Leader and Executive Director" (17 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

3403-07-R: Construction Workers Local 53 affiliated with the Christian Labour Association of Canada (Applicant) v. Kent-Erie Glass & Lock Inc. (Respondent)

Unit: "all hourly employees of Kent-Erie Glass & Lock Inc. covered by this agreement, save and except management personnel, office and sales staff, guards, supervisors, and those persons above the rank of supervisor. This Agreement covers all non-ICI work assigned to employees covered by this Agreement, as has been the standard practice in

Ontario. The non-ICI sector is defined as follows: 1. Shop work, including loading and unloading of materials, warehousing, cutting, processing, fabricating and other inside duties as assigned. 2. Residential glazing. 3. Maintenance and replacement." (2 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	0

3414-07-R: International Association of Machinists and Aerospace Workers (Applicant) v. Ukrainian Canadian Care Centre (Respondent)

Unit: "all employees of the Ukrainian Canadian Care Centre, at 60 Richview Road, Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office, reception and clerical staff" (122 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	126
Number of persons who cast ballots	86
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	86
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	74
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	0

3418-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Amphora Maintenance Services Inc. (Respondent)

Unit: "all employees of Amphora Maintenance Services Inc. employed at or out of 74 Victoria Street in the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff." (12 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

3428-07-R: Canadian Union of Public Employees (Applicant) v. Bayfield Homes Ltd. (Respondent)

Unit: "all employees of Bayfield Homes Ltd. in the County of Prince Edward and the City of Quinte West, save and except Office and Clerical, Team Leaders and persons above the rank of Team Leader" (155 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	155
Number of persons who cast ballots	104
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	65
Number of segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	60
Number of ballots marked against applicant	20
Number of ballots segregated and not counted	0

3436-07-R: Ontario Nurses' Association (Applicant) v. 458422 Ontario Limited o/a Sandfield Place Retirement and Long Term Care Home (Respondent)

Unit: "all Registered Nurses employed in a nursing capacity at Sandfield Place Retirement and Long Term Care Home in the City of Cornwall, save and except the Director of Care and persons above the rank of Director of Care" (8 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

3464-07-R: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Windermere on the Mount Retirement Residence (Respondent)

Unit: "all employees of Windermere on the Mount Retirement Residence, located in the City of London, Ontario, save and except supervisors, persons above the rank of supervisor, front desk, concierge, sales, marketing, nursing, (including registered nurses, registered practical nurses and personnel support workers), activities, beauty salon, clerical staff and human resources." (22 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

3224-06-R: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Hansam Design Build/General Contractor Ltd. (Respondent)

0910-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Pine Valley Enterprises Inc. and/or Pine Valley Ent. Inc. (Respondent) v. Canadian Construction Workers' Union (Intervener)

2609-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. K.D. Clair Construction Ltd. K.D. Clair Western Inc. (Respondent)

3421-07-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Gil and Sons Limited (Respondent) v. Construction Workers, Local 53, affiliated with Christian Labour Association of Canada (Intervener)

3546-07-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters (Applicant) v. Vitality Foodservice Canada Inc. (Respondent)

Unit: "all employees of Vitality Foodservice Canada Inc., in the Province of Ontario, save and except supervisors, and those above the rank of supervisor, office staff and sales people" (18 employees in unit)

Applications for Certification Dismissed Subsequent to Vote

1493-06-R: Labourers International Union of North America, Local 506 (Applicant) v. Smid Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of Smid Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working forepersons and persons above the rank of non-working foreperson" (14 employees in unit)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	31
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names do not appear on voters' list	8

1856-06-R: The Canadian Union of Postal Workers (CUPW) (Applicant) v. Distinction Service Plus Inc. (Respondent) v. Universal Workers Union, Labourers International Union of North America, Local 183 (Intervener)

Unit: "all cleaners, excluding the supervisors and manager working in the Canada Post Corporation South Central Letter Processing Plant (SCLPP) located at 969 Eastern Avenue, Toronto" (63 employees in unit)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names	16

appear on voter's list	
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	1

1077-07-R: Canadian Construction Workers' Union (Applicant) v. Urbancorp Toronto Management Inc. (Respondent)

2467-07-R: Labourers' International Union of North America, Local 247 (Applicant) v. Cruickshank Construction Limited (Respondent)

Unit: "all construction labourers in the employ of the responding party in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman." (21 employees in unit)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	42
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	42
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	27
Number of ballots segregated and not counted	0

2725-07-R: Teamsters Local Union No. 938 (Applicant) v. Ontario Lottery and Gaming Corporation c.o.b. as OLG Casino Point Edward (Respondent)

Unit: "all employees of Ontario Lottery Gaming c.o.b. as OLG Casino Point Edward at 2000 Venetian Boulevard in Point Edward, Ontario, save and except supervisors and those above the rank of supervisor, office and clerical staff, security and surveillance officers." (190 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	355
Number of persons who cast ballots	304
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	185
Number of segregated ballots cast by persons whose names appear on voter's list	119
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	66
Number of ballots marked against applicant	121
Number of ballots segregated and not counted	116

3223-07-R: Ontario Secondary School Teachers' Federation (OSSTF/FEESO) (Applicant) v. University of Waterloo (Respondent)

Unit: "all employees of the University of Waterloo employed at the University's main campus at 200 University Avenue West, in Waterloo, Ontario, and at the University's School of Architecture at 7 Melville Street, in Cambridge, Ontario, and at the University's Distance & Continuing Education & Part-Time Studies Department at 335 Gage Avenue, in Kitchener, Ontario, and at the University's School of Pharmacy at 195 Columbia Street West, Kitchener, Ontario, in pay grades 8 and below, save and except: persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations within the meaning of subsection 1(3)(b) of the Act; all personnel in the office of the President, Vice-Presidents Academic & Provost, Vice-President Administration & Finance General, the Secretariat, the Ombudsperson, and all personnel in the Human Resources Department; all personnel employed by or working for the Staff Association, Graduate Students Association, Arts Student Union, Engineering Society, Faculty Association, Federation of Students, and Math Coffee and Donut Shop; teaching assistants, instructors, lecturers, language teachers, demonstrators, lab demonstrators, head teachers, early childhood teacher assistants, research scientists, and coaches; all grant employees, including all personnel employed in Research Centres or Centres of Excellence, including, but not limited to, the Population Health Research Group, CARE, CBRPE-NCIC, the Centre for Contact Lens Research, the Centre for Cultural Management, the Centre for Sight Enhancement - SEEPAC, the Institute for Groundwater Research, IGR, the Institute for Risk Research, the Institute for Quantum Computing, the Population Health Research Group, the Survey Research Centre, Tech Transfer & Licensing Office; academic staff including faculty; students; all contract and casual employees; security guards; and employees in other bargaining units as those bargaining units existed on January 17, 2008, for which any trade union holds existing bargaining rights" (924 employees in unit)

Number of names of persons on revised voters' list	1062
Number of persons who cast ballots	1054
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	728
Number of segregated ballots cast by persons whose names appear on voter's list	170
Number of segregated ballots cast by persons whose names do not appear on voters' list	156
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	227
Number of ballots marked against applicant	587
Number of ballots segregated and not counted	243

3257-07-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Metro Label Company Ltd. and, Dawn Canadian Labels Inc. (Respondents)

Unit #1: "all employees of the Metro Label Company Ltd. and Dawn Canadian Labels Inc. in the City of Toronto, save and except, supervisors and persons above the rank of supervisor, office, clerical, sales and quality control employees." (80 employees in unit)

Number of names of persons on revised voters' list	98
Number of persons who cast ballots	97
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	85
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	29
Number of ballots marked against applicant	56
Number of ballots segregated and not counted	12

3357-07-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. The Corporation of the Town of Pelham (Respondent)

Unit: "all employees of The Corporation of the Town of Pelham in the Operations and Recreation & Parks Departments, save and except foreperson and persons above the rank of foreperson" (17 employees in unit)

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	1

3359-07-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Blue Line Durham Region Inc. and, Coventry Connections Inc. and , 1298934 Ontario Ltd. and, 352044 Ontario Ltd. and, Bonnie Sawyer and, Phill Caruso and, Mr. Kumar and Mr. Penu (Respondents)

Unit: "all taxi drivers and taxi owners operating under the Blue Line roof sign licensed to operate in all cities, towns and municipalities in the Regional Municipality of Durham, save and except supervisors, persons above the rank of supervisor, dispatchers, telephone staff, multi-car/multi-plate owners and office and clerical staff." (100 employees in unit)

Number of names of persons on revised voters' list	122
Number of persons who cast ballots	93
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	88
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	49
Number of ballots segregated and not counted	5

3371-07-R: Amalgamated Transit Union, Local 113 (Applicant) v. York BRT Services LP. (Formerly Veolia Transportation Inc.) (Respondent)

Unit: "all employees of York BRT Services LP in the Region of York, save and except inspectors, supervisors, persons above the rank of supervisor, office and sales staff, and employees for whom a trade union holds bargaining rights" (14 employees in unit)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on	0

voters' list	
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	0

Applications for Certification Withdrawn

0959-03-R: Labourers' International Union of North America, Local 837 (Applicant) v. R.E.S. Real Estate Services Limited, and/or 1565265 Ontario Inc. c.o.b. as Produzzi Contracting (Respondents) v. Sundial Homes (Bronte) Limited (Intervener)

3344-05-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. Sodexho MS Canada Ltd. (Respondent)

1707-06-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Shane Baghai Construction Contracting Inc. and, Shane Baghai Homes Inc. and Baghai Development Limited (Respondents) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener)

1708-06-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Shane Baghai Construction Contracting Inc. and, Shane Baghai Homes Inc. and Baghai Development Limited (Respondents) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener)

3285-06-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pace Enterprises (1998) Inc. (Respondent)

3448-06-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. T P L Construction Ltd. (Respondent)

4129-06-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ontario Excavac Inc. (Respondent)

0400-07-R: Canadian Construction Workers' Union (Applicant) v. Cambridge Landscaping Inc. (Respondent) v. Universal Workers Union, Labourers' International Union of North America Local 183 (Intervener)

2396-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Giffels Design-Build Inc. (Respondent) v. McQueen Maintenance Inc. (Intervener)

2677-07-R: Canadian Construction Workers' Union (Applicant) v. Omni Facility Services Canada Limited (Respondent) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Intervener)

3510-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Watson Building Supplies Inc. (Respondent)

3586-07-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and (Applicant) v. Leuschen Bros. Limited, 505263 Ontario Limited and Hagar Central Bus Lines Limited (Respondent)

FIRST AGREEMENT - DIRECTION

2554-07-FC: Service Employees International Union Local 2.on, Brewery, General & Professional Workers' Union (Applicant) v. Ability Janitorial Services Limited (Respondent) *(Withdrawn)*

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0475-05-R: Labourers' International Union of North America, Local 506 (Applicant) v. The Cadillac Fairview Corporation Limited, 1521910 Ontario Limited o/a TGS Asset Management Limited and, 2058790 Ontario Limited (Respondents) *(Terminated)*

1405-05-R: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Eagle Ornamental Precast Ltd. and/or Eagle Stone Precast Ltd. (Respondent) *(Withdrawn)*

4067-06-R: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Gem Campbell Terrazzo & Tile Inc. Gem Campbell (Eastern) Inc. (Respondent) v. Bricklayers, Masons Independent Union of Canada Local 1 (Intervener) *(Withdrawn)*

1355-07-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1173455 Ontario Inc. c.o.b. as B & B Contractor a.k.a. Eugene Bolgar and Mike Bolgar c.o.b. as B & B Contracting a.k.a. Eugene Bolgar and Mike Bolgar c.o.b. as B & B Drywall Contractor, Omega General Construction Inc. and, Magnum Partition Inc. (Respondents) *(Endorsed Settlement)*

2550-07-R: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Michael Zywczyk c.o.b. as Classic E.I.F.S. and, Aras Jonas Simukenas c.o.b. as Aras Construction Services (Respondents) *(Withdrawn)*

3205-07-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Marin Contracting Limited and, Mari Consulting Limited (Respondents) *(Endorsed Settlement)*

3221-07-R: Labourers' International Union of North America, Local 506 (Applicant) v. John Bianchi Grading Ltd. and, Bianchi Contracting (2004) Inc. (Respondents) *(Granted)*

SALE OF A BUSINESS

0475-05-R: Labourers' International Union of North America, Local 506 (Applicant) v. The Cadillac Fairview Corporation Limited, 1521910 Ontario Limited o/a TGS Asset Management Limited and, 2058790 Ontario Limited (Respondents) *(Terminated)*

1405-05-R: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Eagle Ornamental Precast Ltd. and/or Eagle Stone Precast Ltd. (Respondent) *(Withdrawn)*

1355-07-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1173455 Ontario Inc. c.o.b. as B & B Contractor a.k.a. Eugene Bolgar and Mike Bolgar c.o.b. as B & B Contracting a.k.a. Eugene Bolgar and Mike Bolgar c.o.b. as B & B Drywall Contractor, Omega General Construction Inc. and, Magnum Partition Inc. (Respondents) *(Endorsed Settlement)*

2550-07-R: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Michael Zywczyk c.o.b. as Classic E.I.F.S. and, Aras Jonas Simukenas c.o.b. as Aras Construction Services (Respondents) *(Withdrawn)*

3205-07-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Marin Contracting Limited and, Mari Consulting Limited (Respondents) *(Endorsed Settlement)*

3221-07-R: Labourers' International Union of North America, Local 506 (Applicant) v. John Bianchi Grading Ltd. and, Bianchi Contracting (2004) Inc. (Respondents) *(Granted)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

4033-06-R: Robert Deacon (Applicant) v. International Brotherhood of Electrical Workers, Local 115 (Respondent) v. Oosterhof Electrical Services Ltd. (Intervener) *(Withdrawn)*

Unit: "all journeymen and apprentice electricians in the employ of Oosterhof Electrical Services Ltd. in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

4034-06-R: John Prosper (Applicant) v. International Brotherhood of Electrical Workers Construction Council of Ontario, and IBEW Locals 105, 115, 130, 303, 353, 402, 530, 586, 773, 804, 894, 1687 & 1739 (Respondent) v. Oosterhof Electrical Services Ltd. (Intervener) *(Withdrawn)*

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists, and communication cable installers in the employ of Oosterhof Electrical Services Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0377-07-R: Dave Dibbin and Steve Darlington (Applicant) v. Allied Construction Employees Local 1030, United Brotherhood of Carpenters and Joiners of America (Respondent) v. The Kaitlin Group Ltd., Universal Workers Union, Labourers' International Union Of North America Local 183 (Interveners) *(Withdrawn)*

Unit: "all construction labourers in the employ of The Kaitlin Group Ltd. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

0411-07-R: Steve Murakami (Applicant) v. International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721 (Respondent) v. Emergency Door Service Inc. (Intervener) *(Withdrawn)*

Unit: "all employees of Companies signatory to this Agreement engaged in the installation, repairing, servicing and maintaining of doors, save and except non-working foreman persons above the rank of non-working foreman, office, sales shop, plant employees and warehouse employees It is understood that the business of the Employer includes installation, repair and maintenance of wood, metal and/or plastic doors (and any doors made of materials other than wood, metal and plastic) in residential, industrial, commercial, institutional and heavy engineering premises" (1 employees in unit)

2000-07-R: Steve Murakami (Applicant) v. International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721 (Respondent) v. EDS Inc. c.o.b. Emergency Door Service (Intervener) *(Withdrawn)*

Unit: "all employees of Companies signatory to this Agreement engaged in the installation, repairing, servicing and maintaining of doors, save and except non-working foreman persons above the rank of non-working foreman, office, sales shop, plant employees and warehouse employees It is understood that the business of the Employer includes installation, repair and maintenance of wood, metal and/or plastic doors (and any doors made of materials other than wood, metal and plastic) in residential, industrial, commercial, institutional and heavy engineering premises" (1 employees in unit)

3193-07-R: Joseph Boismier (Applicant) v. National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada) and its Local 195 (Respondent) v. G.W. Anglin Manufacturing Limited (Intervener) *(Granted)*

Unit: "All employees of the G.W. Anglin Manufacturing Ltd. in the County of Essex, save and except supervisors, persons above the rank of of supervisor, office, clerical, sales staff and maintenance." (86 employees in unit)

Number of names of persons on revised voters' list	97
Number of persons who cast ballots	84
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	69
Number of segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	77
Number of ballots segregated and not counted	0

3286-07-R: Sean Carter (Applicant) v. Construction Workers Local 6, affiliated with the Christian Labour Association of Canada (Respondent) *(Withdrawn)*

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment and those primarily engaged in the repairing or maintaining of same and all construction labourers in the employ of Phil Groves Sewer Services Inc. in all sectors of the construction industry in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit)

3333-07-R: Tom Buchanan (Applicant) v. Teamsters Local Union #880 (Respondent) v. TF Warehousing Inc. (Intervener) *(Granted)*

Unit: "all employees of TF Warehousing Inc. at Chatham, save and except foremen, persons above the rank of foremen, office and sales staff." (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2
Number of ballots segregated and not counted	0

3415-07-R: Henry Douglas (Applicant) v. Teamsters Local Union No. 879 (Respondent) *(Granted)*

Unit: "all Drivers of 4Refuel in the Hamilton Region including; Dofasco Drivers; Stelco Drivers; Local Delivery Drivers in the Hamilton Region." (12 employees in unit)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	13
Number of ballots segregated and not counted	0

3569-07-R: George Bobojchov (Applicant) v. United Steelworkers, Local 9042 (Respondent) v. Nilfisk-Advance Canada Company (Intervener) *(Dismissed)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3077-05-U: Meshell Dupe (Applicant) v. Canadian Union of Public Employees (CUPE) Ontario Division (Respondent) v. Ontario Council of Alternative Business (OCAB) (Intervener) *(Dismissed)*

3925-05-U: Claudio Vitullo (Applicant) v. Ontario English Catholic Teachers' Association (Respondent) *(Dismissed)*

1116-06-U: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Target Drywall and Acoustics Ltd. (Respondent) *(Withdrawn)*

1494-06-U: Labourers International Union of North America, Local 506 (Applicant) v. Smid Construction Ltd. (Respondent) *(Withdrawn)*

1788-06-U; 1821-06-U: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Shane Baghai Construction Contracting Inc. and, Shane Baghai Homes Inc. and Baghai Development Limited (Respondents) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener); Baghai Development Limited (Applicant) v. Universal Workers Union, Labourers' International Union of North America Local 183 (Respondent) *(Withdrawn)*

2410-06-U: Al Stelling (Applicant) v. C.A.W., Local 707 (Respondent) v. Ford Motor Company of Canada Limited (Intervener) *(Withdrawn)*

2653-06-U: Larry Ronald Ross (Applicant) v. Canadian Union of Public Employees, Local 1623 (Respondent) v. Hôpital Régional de Sudbury Regional Hospital (Intervener) *(Dismissed)*

3437-06-U: International Brotherhood of Electrical Workers, Local 115 (Applicant) v. Oosterhof Electrical Services Ltd., Chad Oosterhof, Len Oosterhof and Bob Deacon (Respondents)
(Withdrawn)

3794-06-U: Labourers' International Union of North America, Local 1089 (Applicant) v. Construction Workers Local 53, affiliated with Christian Labour Association of Canada, Local 53; , Concrete Systems Ltd. (Respondents) *(Terminated)*

4078-06-U: Joe Godrey, Geoff Ireson, Jonathan Pretty, Andry Van Hoorn, Mike Kinnear, John Jacques, Rob Healy, Herb Sybenga, Jim Spinks, Kyle Day, Dwight Rotteau, Curtis Sybenga, Brad White (Applicant) v. Labourers' International Union of North America, Local 1089 (Respondent) v. 799316 Ontario Inc. c.o.b. as Concrete Systems Ltd. (Intervener) *(Withdrawn)*

4131-06-U: Communications Energy and Paperworkers Union of Canada, Local 28-0, Steven Armstrong, Steve Pryor, Doug Laird, Robert Temple and Lisa Temple (Applicant) v. Invista Canada Company (Maitland Site) (Respondent) *(Dismissed)*

0022-07-U: Christian Labour Association of Canada (Applicant) v. Ontario Patient Transfer (Respondent) *(Dismissed)*

0266-07-U: Rajendra Ramnarine (Applicant) v. Regeneration House Inc. (Respondent) *(Withdrawn)*

0440-07-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. EI-Con Construction Inc. (Respondent) *(Withdrawn)*

0683-07-U: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. The Kaitlin Group Ltd. (Respondent) *(Withdrawn)*

1256-07-U: Francois Fullum (Applicant) v. Communications, Energy and Paperworkers Union of Canada, Local 266 (Respondent) v. Roxul Inc. (Intervener) *(Dismissed)*

1591-07-U: Ontario Nurses Association (Applicant) v. Great Northern Nursing Centre (Respondent) *(Withdrawn)*

1620-07-U: United Steelworkers, Local 1-2693 (Applicant) v. Lafarge Construction Materials (Respondent) *(Withdrawn)*

1923-07-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Crossby Dewar Inc. (Respondent) *(Terminated)*

1968-07-U: Bill Blundell (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 818 (Respondent) v. Veyance Technologies Canada Inc. (Intervener) *(Dismissed)*

2170-07-U: Ontario Nurses' Association (Applicant) v. Parents of Technologically Dependent Children of Ontario (Respondent) *(Withdrawn)*

2217-07-U: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Classic Electric Ltd. (Respondent) *(Withdrawn)*

2275-07-U: Steve Legault (Applicant) v. Canadian Union of Public Employees and its local 4365 (Respondent) v. Rouge Valley Health System (Intervener) *(Dismissed)*

2278-07-U: Brian Leech (Applicant) v. United Food & Commercial Workers, Local 206 (Respondent) v. London Hospital Linen Service Inc. (Intervener) *(Withdrawn)*

2433-07-U: Kassandra Seguin (Applicant) v. Retail Wholesale and Department Store Union (Respondent) *(Withdrawn)*

2450-07-U: Gerald J. Major (Applicant) v. UFCW Local 1000A (Respondent) *(Dismissed)*

2465-07-U: Ontario Nurses Association (Applicant) v. Great Northern Nursing Centre (Respondent) *(Withdrawn)*

2519-07-U: Michael A. Valade (Applicant) v. United Steelworkers Union Local 9042 (Respondent) v. Indal Technologies Inc. (c.o.b. as "Curtiss- Wright Controls") (Intervener) *(Withdrawn)*

2527-07-U: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Pro-Mart Industrial Products Ltd. (Respondent) *(Withdrawn)*

2539-07-U: Service Employees International Union Local 2.on, Brewery, General & Professional Workers' Union (Applicant) v. Ability Janitorial Services Limited (Respondent) *(Withdrawn)*

2661-07-U: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. K.D. Clair Construction Ltd. K.D. Clair Western Inc. (Respondent) *(Granted)*

2701-07-U: Teamsters Local Union 91 (Applicant) v. CAA North & East Ontario (Respondent) *(Withdrawn)*

2797-07-U: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Ellis Don Corporation (Respondent) *(Withdrawn)*

2808-07-U: Michael Lyons, Glen Crawford, Bill Strangway (Retired), Rick Hamilton, Joe Winder (Retired), Mike Dillabough, Kevin Miller, John Golub, Louie Lariviere, Dave Aldrey, Kevin Dafoe and Rick Daley (Applicant) v. Power Workers' Union, CUPE Local 1000 (Respondent) *(Dismissed)*

2882-07-U: Cheryl Rowe (Applicant) v. Canadian Union of Public Employees, Local 1263 (Respondent) *(Withdrawn)*

3012-07-U: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Sobeys Capital Inc. (Respondent) *(Withdrawn)*

3030-07-U: Construction Workers Local 53, affiliated with Christian Labour Association of Canada (CLAC) (Applicant) v. Elric Contractors of Wallaceburg Limited, Richard Mackenzie (Respondents) *(Dismissed)*

3038-07-U: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. 1594313 Ontario Ltd. o/a SB Electrical Services (Respondent) *(Granted)*

3183-07-U: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of North Glengarry (Respondent) *(Withdrawn)*

3195-07-U: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Giffels Properties Limited and/or Giffels Limited and/or Giffels Associates Limited and/or Giffels Developments Inc. and/or Giffels Design-Build Inc. and, McQueen Maintenance Inc. (Respondents) *(Withdrawn)*

3208-07-U: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Marin Contracting Limited (Respondent) *(Endorsed Settlement)*

3252-07-U: David Augustus Blake (Applicant) v. UFCW Local 1000A (Respondent) *(Withdrawn)*

3264-07-U: Floyd Hodder (Applicant) v. CAW Local 1285 (Respondent) v. TI Automotive Canada Inc. (Intervener) *(Withdrawn)*

3288-07-U: Davies Kipkorir Koech (Applicant) v. United Food & Commercial Workers Canada, Locals 175 & 633 (Respondent) *(Withdrawn)*

3373-07-U: Ontario Public Service Employees Union (Applicant) v. Across Boundaries (Respondent) *(Withdrawn)*

3477-07-U: The Ontario Secondary School Teachers' Federation (Applicant) v. The University of Waterloo (Respondent) *(Withdrawn)*

APPLICATION FOR INTERIM ORDER

2968-07-M: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Sobeys Capital Inc. (Respondent) *(Withdrawn)*

3459-07-M: Teamsters Local Union No. 419 (Applicant) v. Turtle Island Recycling Corporation (Respondent) *(Withdrawn)*

APPLICATIONS FOR RELIGIOUS EXEMPTION

3345-07-M: Wil Wubs (Applicant) v. The United Food & Commercial Workers Canada Local 175, Maple Leaf Consumer Foods Inc. (Respondents) *(Withdrawn)*

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3446-07-M: Compass Group Canada (Beaver) Limited (Applicant) v. Labourers' International Union of North America, Local 837 (Respondent) *(Terminated)*

JURISDICTIONAL DISPUTES

1761-06-JD: Ellis-Don Corporation (Applicant) v. Labourers' International Union of North America, Local 506, Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Carpenters Union, Central Ontario Regional Council, Bramcor Group (Ontario) Ltd. (Respondents) *(Granted)*

1201-07-JD: Aecon Constructors, A Division of Aecon Construction Group Inc. (Applicant) v. Labourers' International Union of North America, Local 506, the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Local 27, Tower Scaffold Services Inc. (Respondents) v. Electrical Power Systems Construction Association ("EPSCA") (Intervener) *(Dismissed)*

1632-07-JD: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 2222 (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council, Local 1059, Crossby Dewar Inc. (Respondents) v. Electrical Power Systems Construction Association (Intervener) *(Terminated)*

1816-07-JD: Labourers' International Union of North America, Local 1036 (Applicant) v. TESC Contracting Company Ltd. and, Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers and its affiliated Local Unions (Respondents) *(Dismissed)*

2168-07-JD: Operative Plasterers', Cement Masons', and Restoration Steeplejacks' International Association of the United States and Canada, Union Local 598 (Applicant) v. Clifford Restoration Limited/Clifford Masonry Limited, Brick and Allied Craft Union of Canada, Local 12 (Respondents) *(Terminated)*

2460-07-JD: Operative Plasterers', Cement Masons', and Restoration Steeplejacks International Association of the United States and Canada, Local Union 598 (Applicant) v. Labourers' International Union of North America, Local 506, Lock-Wall Forming Ltd. (Respondents) *(Withdrawn)*

3320-07-JD: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721, Ellis Don Corporation (Respondents) *(Dismissed)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0130-07-OH: David Laforce (Applicant) v. Thermo King Ottawa, a division of Thermo King Montreal Inc. (Respondent) *(Withdrawn)*

1083-07-OH: International Brotherhood of Electrical Workers, Local 120 on its own behalf and on behalf of its member Wil Pawlowski (Applicant) v. Alberici Constructors Ltd. and Toyota Motor Manufacturing Canada Inc. (Respondents) *(Withdrawn)*

2274-07-OH: Steve Legault (Applicant) v. Rouge Valley Health System (Respondent) v. Canadian Union of Public Employees and its local 4365 (Intervener) *(Dismissed)*

COMPLAINTS UNDER THE ENVIRONMENTAL PROTECTION ACT

3580-07-EP: Jennifer Disheau (Applicant) v. Chesterfield Canada Inc. (Respondent) *(Dismissed)*

CONSTRUCTION INDUSTRY GRIEVANCES

1897-04-G: United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local Union 663 (Applicant) v. Mechanical Contractors Association of Sarnia (Respondent) v. Sarnia Building and Construction Trades Council, United Brotherhood of Carpenters and Joiners of America, Local 1256, Sarnia Construction Association (Interveners) *(Withdrawn)*

3334-06-G: Marble, Tile & Terrazzo, Local 31 (Applicant) v. Asselstine Floor Coverings (Respondent) *(Terminated)*

3497-06-G; 3458-07-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America, Local 494 (Applicant) v. A Square Forming Ltd. (Respondent) *(Withdrawn)*

3667-06-G: International Brotherhood of Electrical Workers, Local 115 (Applicant) v. Oosterhof Electrical Services Ltd. (Respondent) *(Withdrawn)*

4068-06-G: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Gem Campbell (Eastern) Inc. (Respondent) *(Withdrawn)*

4132-06-G: United Brotherhood of Carpenters and Joiners of America, Local 1256 (Applicant) v. McNally Construction Inc. (Respondent) *(Endorsed Settlement)*

0062-07-G: Labourers' International Union of North America, Local 1089 (Applicant) v. 799316 Ontario Inc. c.o.b. as Concrete Systems (Respondent) v. Joe Godfrey, Geoff Ireson, Jonathan Pretty, Andy Van Hoorn, Mike Kinnear, John Jacques, Rob Healy, Herb Sybenga, Jim Spinks, Kyle Day, Dwight Rotteau, Curtis Sybenga, Brad White (Intervener) *(Withdrawn)*

0223-07-G; 0224-07-G: Labourers' International Union of North America, Local 506 (Applicant) v. Diplock Floor Ltd./Lock-Wall Forming Ltd. (Respondent) v. Operative Plasterers', Cement Masons', Restoration Steeplejacks International Association of the United States and Canada, Union Local 598 (Intervener); Labourers' International Union of North America, Local 506 (Applicant) v. Lock-Wall Forming Ltd. (Respondent) v. Operative Plasterers',

Cement Masons', Restoration Steeplejacks International Association of the United States and Canada, Union Local 598 (Intervener) *(Withdrawn)*

0593-07-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. The State Group Inc. (Respondent) *(Withdrawn)*

1234-07-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. The State Group Inc. (Respondent) *(Dismissed)*

1354-07-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Magnum Partition Inc. (Respondent) *(Endorsed Settlement)*

1490-07-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Crossby Dewar (Respondent) v. Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 2222 (Intervener) *(Terminated)*

2172-07-G; 2937-07-G: Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Crossby Dewar Inc. (Respondent) *(Terminated)*

2551-07-G: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Michael Zywczyk c.o.b. as Classic E.I.F.S. and, Aras Jonas Simukenas c.o.b. as Aras Construction Services (Respondents) *(Withdrawn)*

2795-07-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Paveland Limited (Respondent) *(Withdrawn)*

2811-07-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Terragon Landscaping Ltd. (Respondent) *(Withdrawn)*

2957-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. Mid-Canada Construction Corp. (Respondent) *(Granted)*

2958-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. Mid-Canada Construction Corp. (Respondent) *(Granted)*

3008-07-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Dew Point Insulation Systems Inc. (Respondent) *(Withdrawn)*

3146-07-G: Labourers' International Union of North America, Local 1059 (Applicant) v. RHI Canada Inc. (Respondent) *(Terminated)*

3157-07-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. KP Insulation Services Co. Ltd. (Respondent) *(Endorsed Settlement)*

3201-07-G; 3202-07-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 2222 (Applicant) v. Bruce Power LP (Respondent) *(Withdrawn)*

3203-07-G; 3206-07-G; 3207-07-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Marin Contracting Limited (Respondent); Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mari Consulting Limited (Respondent); Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Marin Contracting Limited (Respondent) *(Endorsed Settlement)*

3292-07-G: Labourers' International Union of North America, Local 1089 (Applicant) v. Nicholson & Hall Corporation (Respondent) *(Withdrawn)*

3301-07-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Bondfield Construction Company Limited (Respondent) *(Withdrawn)*

3306-07-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. La Chateau Carpentry (Respondent) *(Dismissed)*

3351-07-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Clane Restoration Limited (Respondent) *(Withdrawn)*

3363-07-G: Construction Workers Local 52 affiliated with the Christian Labour Association of Canada (Applicant) v. Kingdom Construction Ltd. (Respondent) *(Terminated)*

3382-07-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Youngs Architectural Glazing Ltd. (Respondent) *(Granted)*

3388-07-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Extreme Insulation Ltd. (Respondent) *(Granted)*

3389-07-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Herve Pomerleau Inc. (Respondent) *(Withdrawn)*

3407-07-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. 1198934 Ontario Inc. o/a Basic Structure Engineering Glazing Contractors (Respondent) *(Granted)*

3416-07-G: Sheet Metal Workers International Association, Local 47 (Applicant) v. Hydracorp Canada Ltd. (Respondent) *(Granted)*

3431-07-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. P.G.S. Forming Inc. and Pier Giorgio Silverstri (Respondent) *(Endorsed Settlement)*

3432-07-G: Central Ontario Regional Council of Carpenters Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America, on behalf of Allied Construction Employees, Local 1030 (Applicant) v. P.G.S. Forming Inc. (Respondent) *(Endorsed Settlement)*

3437-07-G: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. P.G.S. Forming Inc. (Respondent) *(Granted)*

3445-07-G: The International Union of Painters and Allied Trades, Local Union 200 (Applicant) v. Thomas Nicholas Piscopo c.o.b. as TNP Contracting (Respondent) *(Endorsed Settlement)*

3471-07-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. R. Baun Construction Inc. and, Jeffery Baun (Respondents) *(Endorsed Settlement)*

3481-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bianchi Contracting (2004) Inc. (Respondent) *(Granted)*

3482-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bianchi Contracting (2004) Inc. (Respondent) *(Granted)*

3483-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bianchi Contracting (2004) Inc. (Respondent) *(Granted)*

3488-07-G: Labourers' International Union of North America, Local 625 (Applicant) v. Vito Masonry (Respondent) *(Withdrawn)*

3500-07-G: Canadian Union of Skilled Workers (Applicant) v. AMEC NCL Limited (Respondent) *(Withdrawn)*

3501-07-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Don Mathews c.o.b. as Twins Drywall & Acoustics (Respondent) *(Granted)*

3509-07-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Morgado Construction Ltd. (Respondent) *(Withdrawn)*

3547-07-G: Construction Workers Local 6 affiliated with Christian Labour Association of Canada (Applicant) v. Halton Sheet Metal Ltd. (Respondent) *(Withdrawn)*

3548-07-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. Xtreme Glass Inc. (Respondent) *(Granted)*

APPEALS - EMPLOYMENT STANDARDS ACT

0304-04-ES: Lawry Shooting Sports Inc. (Applicant) v. Sy Benson and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0759-05-ES: Mr. K's Inc. operating as Times Square (Applicant) v. Holly Janssen and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1612-05-ES: Kevin F. O'Grady, Director of Valence Semiconductor, Canada Inc. (Applicant) v. Alexandre Zassoko, Sied Medhi Fakhraie, Gheorghe Berbecel, Vadim Moshinsky, Gholamreza Chaji , Abbas Hormati, Ayal Shoval, Mohammad Asmani, Kasra Ardalan, Hossein Alavi, Mohammad Omidi , Nirmal Sohi, Admad Chini, Sasan Nikneshon, and Director of Employment Standards (Respondents) *(Terminated)*

0291-06-ES: Nitsa Katis (Applicant) v. Forget & Mathews LLP and Director of Employment Standards (Respondents) *(Withdrawn)*

2681-06-ES: Lorraine Condie (Applicant) v. Universal Marketing, Director of Employment Standards (Respondents) *(Granted)*

3890-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Kayla Marges and Director of Employment Standards (Respondents) *(Dismissed)*

3891-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Vijay Mittal and Director of Employment Standards (Respondents) *(Dismissed)*

3892-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Valerie Georges and Director of Employment Standards (Respondents) *(Dismissed)*

3893-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Susan Marges and Director of Employment Standards (Respondents) *(Dismissed)*

3894-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Nicole Preece and Director of Employment Standards (Respondents) *(Dismissed)*

3896-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Eugene Aziz and Director of Employment Standards (Respondents) *(Dismissed)*

3897-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Abdul Mohammed and Director of Employment Standards (Respondents) *(Dismissed)*

3898-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Ali Khalid and Director of Employment Standards (Respondents) *(Dismissed)*

3899-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Khalid Zaheer and Director of Employment Standards (Respondents) *(Dismissed)*

3900-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Tharsini Thangavadivel and Director of Employment Standards (Respondents) *(Dismissed)*

3901-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Kanchan Sarkar and Director of Employment Standards (Respondents) *(Dismissed)*

3902-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Marcela Salcedo and Director of Employment Standards (Respondents) *(Dismissed)*

3903-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Michael Marges and Director of Employment Standards (Respondents) *(Dismissed)*

3904-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Muhammed Mateen and Director of Employment Standards (Respondents) *(Dismissed)*

3905-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Faisal Mahmood and Director of Employment Standards (Respondents) *(Dismissed)*

3906-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Muhammad Kashif and Director of Employment Standards (Respondents) *(Dismissed)*

3907-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Brandon Harris and Director of Employment Standards (Respondents) *(Dismissed)*

3908-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Steven Green and Director of Employment Standards (Respondents) *(Dismissed)*

3909-06-ES: Parry Rosenberg a Director of Clegg Campus Marketing Corp. (Applicant) v. Susan Gideon and Director of Employment Standards (Respondents) *(Dismissed)*

0571-07-ES: Audio-Dent Inc. (Applicant) v. Sylvia Beaumont and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0852-07-ES: StarTek Canada Services, Ltd. (Applicant) v. Wendy Withers-Horwood and Director of Employment Standards (Respondents) *(Granted)*

0854-07-ES: StarTek Canada Services, Ltd. (Applicant) v. Tyler Jodoin and Director of Employment Standards (Respondents) *(Granted)*

1191-07-ES: Sandra Shapiro, a Director of Tracmount/Glojack Leasing Ltd. o/a Corporate Cars (Applicant) v. Jeff Kenez and Director of Employment Standards (Respondents) *(Dismissed)*

1193-07-ES: Jane Stanton (Applicant) v. Peter Boyer Chevrolet Pontiac Buick GMC Ltd. and Director of Employment Standards (Respondents) *(Withdrawn)*

1345-07-ES: 2095742 Ontario Inc. (Applicant) v. Leona Laurin and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1571-07-ES: Serdar Tutuman (Applicant) v. Akar Exterior Co. and Director of Employment Standards (Respondents) *(Dismissed)*

1628-07-ES: 1456875 Ontario Ltd. o/a Allianze Power Corp. (Applicant) v. Elizabeth Dos Santos and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1731-07-ES: Rodney McBrien, a Director of Ray's Truck & Auto Centre Ltd. (Applicant) v. Raymond Schoon, William Knott and Director of Employment Standards (Respondents) *(Dismissed)*

1933-07-ES: Lori Wisbey (Applicant) v. Trax Personnel Services Inc. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2027-07-ES: Steve Ramos, Director of Molds Are Us Inc. (Applicant) v. Stan Donovan and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2069-07-ES: Ronald Rousseau, Director of Molds Are Us Inc. (Applicant) v. Stan Donovan and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2097-07-ES: Ray's Auto Centre & Towing (Applicant) v. Dave Fisher and Director of Employment Standards (Respondents) *(Terminated)*

2203-07-ES: Day Care Connection (Applicant) v. Samantha Metcalfe and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2204-07-ES: Kitchens 'N Sync (Applicant) v. Julie Hundert and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2209-07-ES: Cana-Datum Moulds Ltd. (Applicant) v. James Carvalho and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2264-07-ES: Hajro Cini (Applicant) v. AC Technical Systems Ltd. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2281-07-ES: Catherine Kent (Applicant) v. Yorkwest Plumbing Supply Inc. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2304-07-ES: Roseanne Mousseau (Applicant) v. Startek Canada Services Ltd., Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2404-07-ES: Lianne Lee (Applicant) v. GGS Plastic Engineering Inc. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2528-07-ES: Toronto Personnel Inc. o/a Winters Technical Staffing (Applicant) v. Deborah Mahoney-Sanderson and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2579-07-ES: Tamara Mullen (Applicant) v. General Dynamics Land Systems Canada and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2588-07-ES: David Joseph G. Williston (Applicant) v. Coliseum Mississauga and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2592-07-ES: Maureen Jeffery (Applicant) v. Caregard Enterprises Inc. o/a Lakeshore Place and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2624-07-ES: John Beauchamp (Applicant) v. Day Specialties Corporation, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2627-07-ES: Joseph M. Socha (Applicant) v. 504802 Ontario Inc./JCJ Contracting & Canadian Waste Handlers and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2635-07-ES: Nygard International Partnership (Applicant) v. Myiam Nouh and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2683-07-ES: R.L. Contracting (Applicant) v. Stephan Amyotte, Claude Grisé and Director of Employment Standards (Respondents) *(Dismissed)*

2710-07-ES: Mark S. Smith (Applicant) v. Vacmaster and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2735-07-ES: ARO Inc. (Applicant) v. Amy Smith-LaForme, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2737-07-ES: Miller's Auto Recycling (1992, Ltd. (Applicant) v. Michael Lemay and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2772-07-ES: Christina Walker (Applicant) v. 800727 Ontario Inc. operating as Saturn of Peterborough, Director of Employment Standards (Respondents) *(Granted)*

2776-07-ES: Gennady Tereshko (Applicant) v. Sky Guard International Inc. and Director of Employment Standards (Respondents) *(Dismissed)*

2789-07-ES: Victoria Kowlessar (Applicant) v. 2931621 Canada Inc. o/a Canadian Tire and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2816-07-ES: Ideal Fire Protection (Applicant) v. Allan Durand and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2860-07-ES: Bogdan Leonte (Applicant) v. Canadian Servo & Electronics and Director of Employment Standards (Respondents) *(Dismissed)*

2861-07-ES: J.J.A.S. Catering & Banquets Inc. (Applicant) v. Dhirender Puniani and Director of Employment Standards (Respondents) *(Terminated)*

2929-07-ES: Beauty By Nature Inc. (Applicant) v. Marion Nirschl and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2942-07-ES: Howard Pollock (A Director of 655799 Ontario Limited o/a Heaslip Canada) (Applicant) v. Elizabeth Harbosin, Director of Employment Standards (Respondents) *(Withdrawn)*

3000-07-ES: Andrzej Szaflarski (Applicant) v. Indalloy Division of Caradon and Director of Employment Standards (Respondents) *(Dismissed)*

3048-07-ES: Centura (Toronto) Limited (Applicant) v. Nigel Williams and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3082-07-ES: 620369 Ontario Inc. operating as Herman's Building Centres (Applicant) v. Stewart Kern and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3086-07-ES: Samrawit Hailu (Applicant) v. Belmont House and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3087-07-ES: Churchill Foods Ltd. Cob as Tim Horton's (Applicant) v. Maninder Khehra, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3123-07-ES: George Nadas a Director of R Cubed Recycling Corp. (Applicant) v. Winston Simms and Director of Employment Standards (Respondents) *(Terminated)*

3136-07-ES: Rajiv Panchal, A Director of Future Fabricating & Design Inc. (Applicant) v. Mukund Panchal, Lenny Milone, John Noseworthy, Dave Anderson and Director of Employment Standards (Respondents) *(Withdrawn)*

3190-07-ES: Bradley A. Denton, A Director of Future Fabricating & Design Inc. (Applicant) v. Mukund Panchal, John Noseworthy, Dave Anderson, Lenny Milone and Director of Employment Standards (Respondents) *(Terminated)*

3284-07-ES: Marcello Di Palma (Applicant) v. Capital Tool & Design Limited and Director of Employment Standards (Respondents) *(Terminated)*

3289-07-ES: Medex. Fish Importing & Exporting Co. Ltd. (Applicant) v. Trevor K. Bertrand, Director of Employment Standards (Respondents) *(Terminated)*

3340-07-ES: Serge R. Daoust, a Director of 555 Church Street Inc. (Applicant) v. Joanne McGarry and Director of Employment Standards (Respondents) *(Dismissed)*

3348-07-ES: Masova Inc. (Applicant) v. Luffullo Jumakhon, Director of Employment Standards (Respondents) *(Dismissed)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

2589-06-HS: The Algoma Treatment Centre (Applicant) v. Mark Grbich, Inspector (Respondent) *(Withdrawn)*

2406-07-HS: Procor Limited (Applicant) v. Boilermakers Union Local 128, Ram Kaushal, Inspector (Respondents) *(Withdrawn)*

2679-07-HS: W.A. Stephenson Mechanical Contractors Limited (Applicant) v. Stefan Pikor - Inspector (Respondent) *(Withdrawn)*

3440-07-HS: dmg world media (Canada) Inc. (Applicant) v. Jason Williams, Inspector (Respondent) *(Dismissed)*

COMPLAINTS UNDER THE SMOKING IN THE WORKPLACE ACT

2159-07-M: Mary Rose Talani (Applicant) v. Burrell Overhead Door Limited (Respondent) *(Withdrawn)*

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

3039-07-PS: Ontario Nurses' Association (Applicant) v. Central Community Care Access Centre (Respondent) *(Withdrawn)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1785-05-R: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. City of Hamilton (Respondent)

3395-06-R; 3414-06-R; 3436-06-R; 3441-06-R; 3502-06-R; 3611-06-R; 3503-06-R; 3685-06-R; 3991-06-R; 0389-07-R: Canadian Construction Workers' Union (Applicant) v. Empire Continental Management Inc. c.o.b. Empire Communities and/or Empire Homes (Respondent) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Intervener); Canadian Construction Workers' Union (Applicant) v. Saddlebrook Construction Inc. and/or Saddlebrook Management Consultants Inc. (Respondent) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Intervener); Canadian Construction Workers' Union (Applicant) v. 59 Developments Inc. and/or 59 Management Inc. and/or 59 Management Services and/or 59 Services and/or 59 Property Management (Respondent) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Intervener); Canadian Construction Workers' Union (Applicant) v. 1516767 Ontario Ltd. and/or Canderel Development Corporation/La Corporation D'Exploitation Canderel Ltee and/or Canderel Corporate Centre (Ottawa) Inc. and/or Services de Gestion et Developpement Canderel Inc./Canderel Management and Development Services Inc. and/or Canderel Management Services Ltd./Services de Gestion Canderel Ltee. and/or Canderel Limited/Canderel Ltee. and/or Canderel Stoneridge Equity Group Inc. and/or Canderel Properties Limited/Properties Canderel Limitee and/or Newport Beach Development Inc., and/or Canderel Management Inc. and/or Gestion Canderel Inc., and/or Canderel Stoneridge Construction Inc., and/or Canderel Stoneridge Development Corp., and/or Canderel Stroneridge Interiors Inc., and/or Canderel Stoneridge Properties Inc., and/or Canderel Tower II Inc. (Respondent) v. Universal Workers Union, Labourers' International Union of North America, Local 183, Greater Toronto Sewer and Watermain Contractors Association (Interveners) ; Canadian Construction Workers' Union (Applicant) v. SST Group of Construction Companies Limited (Respondent) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Intervener) ; Canadian Construction Workers' Union (Applicant) v. SST Group of Construction Companies Limited (Respondent) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Intervener) ; Canadian Construction Workers' Union (Applicant) v. Sahara Holdings (1989) Inc. and/or Great Gulf Homes Limited and/or Great Gulf Homes Ltd. and/or The Great Gulf Group of Companies Inc. (Respondent) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Intervener) ; Canadian Construction Workers' Union (Applicant) v. Dominus Construction Corporation and/or, Cityzen Urban Lifestyle and/or, Myriad Group (Respondents) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Intervener); Canadian Construction Workers' Union (Applicant) v. Morguard Properties Limited and/or Morguard Residential (Respondent) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Intervener) ; Canadian Construction Workers' Union (Applicant) v. Claredale Norstar Inc. and/or Willowfield Homes Ltd. (Respondent) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Intervener) *(Dismissed)*

3781-06-ES: Mobinur Alam (Applicant) v. Monte Cristo Restaurant & Piano Bar, Director of Employment Standards (Respondents) *(Granted)*

4030-06-JD: International Union of Painters and Allied Trades, Glaziers Local 1819 (Applicant) v. Ellis-Don Corporation, Solarfective Products Ltd., Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America and, Clearview Solutions (Respondents) *(Dismissed)*

0539-07-ES: 1501635 Ontario Limited o/a Car Max Auto Sales (Applicant) v. Gordon McArdle, Director of Employment Standards (Respondents) *(Dismissed)*

2914-07-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Artistree Construction Inc. (Respondent) *(Dismissed)*

3013-07-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. 1594313 Ontario Ltd. o/a SB Electrical Services (Respondent) *(Dismissed)*

3188-07-G: Millwright Regional Council of Ontario on its own behalf and on behalf of its Local 1410 (Applicant) v. Your Mechanical Inc. and, Donald Stoliker (Director) and Aidan Wornes (Director) (Respondents) *(Granted)*

3209-07-HS: Ron Pearce (Applicant) v. Greg Archibald, Inspector (Respondent) *(Dismissed)*

CASE LISTINGS MARCH 2008

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 2008

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3737-06-R: Construction Workers Local 53, affiliated with Christian Labour Association of Canada (Applicant) v. Concrete Systems Ltd. (Respondent) v. Labourers' International Union of North America, Local 1089 (Intervener)

Unit: "all labourers, carpenters, and equipment operators in the employ of Concrete Systems Ltd. in all sectors of the construction industry in the County of Lambton, save and except the industrial, commercial and institutional sector of the construction industry, and save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

0457-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Fandor Homes Inc. and Fandor Homes (Vintage) Inc. (Respondent)

Unit: "all construction labourers in the employ of Fandor Homes Inc. and Fandor Homes (Vintage) Inc. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0458-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. AMEC NNC Canada Limited (Respondent)

Unit: "all construction labourers in the employ of AMEC NNC Canada Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all construction labourers in the employ of AMEC NNC Canada Limited in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (21 employees in unit)

1543-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Clean Water Works Inc. (Respondent)

Unit: "all construction labourers in the employ of Clean Water Works Inc., in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working foreperson" (2 employees in unit)

2079-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Picture Homes Millennium Inc. (Respondent)

Unit: "all construction labourers in the employ of Picture Homes Millennium Inc. in all sectors of the construction industry in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3404-07-R: Labourers' International Union of North America, Local 625 (Applicant) v. Benoit Drainage Ltd. (Respondent)

Unit: "all construction labourers in the employ of Benoit Drainage Ltd. and all employees of Benoit Drainage Ltd. engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors, in all sectors of the construction industry in the Counties of Essex and Kent other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3592-07-R: Construction Workers Local 53, affiliated with Christian Labour Association of Canada (Applicant) v. JMR Electric Ltd. (Respondent)

Unit: "all sheet metal workers and sheet metal workers' apprentices in the employ of JMR Electric Ltd. in all sectors of the construction industry in the Town of Mattawa and in the geographic townships of Papineau and Mattawan, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3623-07-R: Labourers' International Union of North America Local 527 (Applicant) v. M.E. Tremblay Demolition Inc. (Respondent)

Unit: "all construction labourers in the employ of M.E. Tremblay Demolition Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of M.E. Tremblay Demolition Inc. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3625-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. DLB Construction Limited (Respondent)

Unit: "all construction labourers in the employ of DLB Construction Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3722-07-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 9133 - 4854 Quebec Inc. o/a A.T.G. Electrique (Respondent)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of 9133 - 4854 Quebec Inc. o/a A.T.G. Electrique in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of 9133 - 4854 Quebec Inc. o/a A.T.G. Electrique in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (16 employees in unit)

3750-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Commercial Door Solutions Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Commercial Door Solutions Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Commercial Door Solutions Inc. in all sectors of the construction industry in

the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working-foreman" (3 employees in unit)

3767-07-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. D.P.L. Painting Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of D.P.L. Painting Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of D.P.L. Painting Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (23 employees in unit)

3791-07-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Greater City Concrete Works Limited (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Greater City Concrete Works Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Greater City Concrete Works Limited in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Bargaining Agents Certified Subsequent to Vote

4055-06-R: International Union of Operating Engineers, Local 793 (Applicant) v. TWD Roads Management Inc. (Respondent) v. Toronto and Area Road Builders Association (Intervener)

Unit: "all employees of TWD Roads Management Inc. working in and out of the Cities of Toronto, Hamilton and Vaughan, the Regional Municipalities of Peel and Halton, the Township of Puslinch and Morriston, save and except office, clerical and sales staff, and persons regularly employed for not more than 24 hours per week" (56 employees in unit)

Number of names of persons on revised voters' list	115
Number of persons who cast ballots	95
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	53
Number of segregated ballots cast by persons whose names appear on voter's list	30
Number of segregated ballots cast by persons whose names do not appear on voters' list	12
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	31
Number of ballots segregated and not counted	25

0434-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Concord Trimming Inc. (Respondent) v. Universal Workers Union, L.I.U.N.A. Local 183 (Intervener)

Unit: "all construction employees including all carpenters and carpenters' apprentices in the employ of Concord Trimming Inc. engaged in low-rise residential construction in and out of the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria; the Towns of Cobourg and Port Hope, and the geographic Townships of Hope, Hamilton, and Alnwick in the County of Northumberland; the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton and the County of Simcoe and the District Municipality of Muskoka, save and except office and sales staff and non-working foremen and persons above the rank of non-working foreman" (7 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	1
Number of ballots segregated and not counted	4

2409-07-R: Service Employees International Union Local 1.on (Applicant) v. Personal Attendant Care Incorporated (Respondent)

Unit: "all employees of Personal Attendant Care Inc., in the Town of Whitby, save and except Chief Executive Officer, Director of Finance/IT, Human Resources Manager, Human Resources Generalist, Executive Assistant to the CEO, Client Service Supervisor and persons above the rank of Client Service Supervisor and employees covered by a subsisting Collective Agreement as of October 30, 2007" (15 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	8

3427-07-R: Canadian Union of Public Employees Local 1281 (CUPE 1281) (Applicant) v. Karma Co-Operative Inc. (Respondent)

Unit: "all employees of Karma Food Co-operative Inc. in the City of Toronto, save and except General Manager, Produce Manager, Head Shift Managers, persons above the rank of General Manager and non-waged "Coop Member" workers" (2 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

3456-07-R: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. 1537601 Ontario Incorporated c.o.b. The Royal on Gordon (Respondent)

Unit: "all employees of 1537601 Ontario Incorporated c.o.b. The Royal on Gordon, in the City of Guelph, save and except Supervisors and persons above the rank of Supervisor" (30 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

3462-07-R: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Morgan Scott Partnership (Respondent)

Unit: "all employees of the Morgan Scott Partnership, located at 1700 Drew Road in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (12 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	2

3492-07-R: Ontario Public Service Employees Union (Applicant) v. Carefor Health & Community Services (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all paramedical employees of Carefor Health & Community Services in the City of Ottawa, save and except managers, persons above the rank of manager, and persons covered by an existing collective agreement" (29 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3495-07-R: International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721 (Applicant) v. Stacom Baltic Inc. (Respondent)

Unit: "all ironworkers and ironworkers' apprentices in the employ of Stacom Baltic Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all ironworkers and ironworkers' apprentices in the employ of Stacom Baltic Inc. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (20 employees in unit)

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

3530-07-R: Ontario Public Service Employees Union (Applicant) v. Temiskaming Hospital (Respondent)

Unit: "all paramedical employees of the Temiskaming Hospital in the City of Temiskaming Shores, Ontario, save and except Technical Director - Laboratory Services, Technical Director - Radiology Service, Director of Medical Records, Director of Dietetics, Director of Pharmacy, Director of Physiotherapy and persons above such ranks, persons regularly employed for more than twenty-four (24) hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of February 15, 2008, being the date of application" (15 employees in unit) *(Having regard to the agreement of the parties) (Clarity Note)*

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on	

voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

3531-07-R: IBEW Construction Council of Ontario (Applicant) v. Gil & Sons Limited (Respondent) v. Construction Workers, Local 53, affiliated with Christian Labour Association of Canada (Intervener)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Gil & Sons Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Gil & Sons Limited in all sectors of the construction industry in the Counties of Essex and Kent and the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (10 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3540-07-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Integrated Distribution Systems Limited Partnership c.o.b. as Wajax Industries (Respondent)

Unit: "all employees of Integrated Distribution Systems Limited Partnership c.o.b. as Wajax Industries working in/out of its Mississauga location save and except supervisors, persons above the rank of supervisors, sales staff, office and clerical staff" (96 employees in unit) *(Having regard to the agreement of the parties) (Clarity Note)*

Number of names of persons on revised voters' list	93
Number of persons who cast ballots	87
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	81
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	40
Number of ballots segregated and not counted	6

3573-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Waterford Building Maintenance Inc. (Respondent)

Unit: "all employees of Waterford Building Maintenance Inc. employed at Lawrence Square, 700 Lawrence Avenue West, in the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff" (25 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

3587-07-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Canada Steel Service Centre (Sudbury) Inc. (Respondent)

Unit: "all employees of Canada Steel Service Centre (Sudbury) Inc. in the City of Greater Sudbury, save and except supervisors and persons above the rank of supervisor, office, clerical, and sales employees" (5 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

3594-07-R: Canadian Union of Public Employees (Applicant) v. Bethesda Home for the Mentally Handicapped Inc. (Respondent)

Unit: "all temporary (relief) employees employed for not more than twenty-four (24) hours per week at the Bethesda Home for the Mentally Handicapped Inc. in the Regional Municipality of Niagara, save and except supervisors, persons above the rank of supervisor, registered nurses, office and clerical staff, students employed during or in association with co-operative placement programs" (118 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	130
Number of persons who cast ballots	45
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	34
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	38

Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

3604-07-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Gil and Sons Limited (Respondent) v. Construction Workers, Local 53, affiliated with Christian Labour Association of Canada (Intervener)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Gil and Sons Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Gil and Sons Limited in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener	1
Number of ballots segregated and not counted	0

3636-07-R: United Brotherhood of Carpenters and Joiners of America, Local 1244 (Applicant) v. Gil and Sons Limited (Respondent) v. Construction Workers, Local 53, affiliated with Christian Labour Association of Canada (Intervener)

Unit: "all millwrights and millwrights' apprentices in the employ of Gil and Sons Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all millwrights and millwrights' apprentices in the employ of Gil and Sons Limited in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots segregated and not counted	3

3654-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Waterford Building Maintenance Inc. (Respondent)

Unit: "all employees of Waterford Building Maintenance Inc. employed at LAMP Community Health Centre, 185 Fifth Street, in the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff" (4 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

3793-06-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Concrete Systems Ltd. (Respondent) v. Construction Workers, Local 53 affiliated with Christian Labour Association of Canada (Intervenor)

Unit: "all construction labourers employed by 799316 Ontario Inc. c.o.b. as Concrete Systems in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foremen". (10 employees in unit)

3622-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Lewis Builds Corporation, DLB Construction Limited (Respondents)

3695-07-R: Ontario Nurses' Association (Applicant) v. SCO Health Services – Résidence Saint-Louis (Respondent)

Unit: "all Registered Nurses employed in a nursing capacity at Résidence Saint-Louis in the City of Ottawa, save and except the Director of Care and persons above the rank of Director of Care" (10 employees in unit)

3812-07-R: Service Employees International Union Local 1 Canada (Applicant) v. Abbeylawn Manor Retirement Home (Respondent)

Applications for Certification Dismissed Subsequent to Vote

1195-03-R: The International Union of Painters and Allied Trades, Local 1891 (Applicant) v. 859747 Ontario Inc. o/a Dover Interiors (Respondent)

Unit: "all painters and painters' apprentices in the employ of 859747 Ontario Inc. o/a Dover Interiors in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all paianters and painters' apprentices in the employ of 859747 Ontario Inc. o/a Dover Interiors in all other sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman. Clarity Note: The Board notes that Drywall tapers are included in the bargaining unit." (5 employees in unit)

Number of names of persons on revised voters' list	40
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	1

Number of segregated ballots cast by persons whose names appear on voter's list	32
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	26

2055-04-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. 1229912 Ontario Limited c.o.b. as ASL Alpine Sodding & Landscaping Limited (Respondent)

Unit: "all construction labourers in the employ of Alpine Sodding & Landscaping and/or Alpine Sodding Co. (Toronto) Limited and/or A.S.L. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (65 employees in unit)

3793-06-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Concrete Systems Ltd. (Respondent) v. Construction Workers, Local 53 affiliated with Christian Labour Association of Canada (Intervener)

Unit: "all construction labourers employed by 799316 Ontario Inc. c.o.b. as Concrete Systems in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foremen" (18 employees in unit)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names do not appear on voters' list	9
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener	1
Number of ballots marked in favour of no union	1
Number of ballots segregated and not counted	14

3493-07-R: Teamsters Local Union 847, AFL-CIO-CLC (Applicant) v. ABC Climate Control Systems Inc. (Respondent)

Unit: "all employees of ABC Climate Control Systems at 54 Bethride Road, Etobicoke, Ontario, save and except supervisors and persons above the rank of supervisor, clerical, office, sales and accounting staff" (240 employees in unit)

Number of names of persons on revised voters' list	253
Number of persons who cast ballots	223
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	219
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	72

Number of ballots marked against applicant	146
Number of ballots segregated and not counted	4

3511-07-R: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. CSH Jackson Creek Inc. operating as Jackson Creek Retirement Residence (Respondent)

Unit: "all employees employed by the responding party at Jackson Creek Retirement Residence, in the City of Peterborough save and except the Supervisors and those above the rank of Supervisors" (24 employees in unit)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	0

3560-07-R: Canadian Union of Public Employees (Applicant) v. Sandfield Place (Respondent)

Unit: "all employees employed by Sandfield Place in the City of Cornwall, Ontario, save and except Registered Nurses, supervisors and persons above the rank of supervisor." (68 employees in unit)

Number of names of persons on revised voters' list	67
Number of persons who cast ballots	58
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	58
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	31
Number of ballots segregated and not counted	0

3572-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Wynford Services Commercial Cleaning Contractors (Respondent)

Unit: "all employees of Wynford Services Commercial Cleaning Contractors employed at or out of 11 King Street West, in the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff." (8 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

3584-07-R: International Association of Machinists and Aerospace Workers (Applicant) v. Conestoga Cold Storage (Respondent)

Unit: "all employees of Conestoga Storage, in the Region of Peel, Ontario, save and except supervisors, persons above the rank of supervisor, office, reception and clerical staff." (90 employees in unit)

Number of names of persons on revised voters' list	86
Number of persons who cast ballots	93
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	84
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	9
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	33
Number of ballots marked against applicant	51
Number of ballots segregated and not counted	9

3648-07-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters (Applicant) v. Vitality Foodservice Canada Inc. (Respondent)

Unit: "all field service technicians of Vitality Foodservice Canada Inc. working at or out of Concord, Ontario, save and except team leaders, those above the rank of team leader, office, sales and clerical staff" (17 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	14
Number of ballots segregated and not counted	1

3812-07-R: Service Employees International Union Local 1 Canada (Applicant) v. Abbeylawn Manor Retirement Home (Respondent)

Applications for Certification Withdrawn

3060-05-R; 3065-05-R: Labourers' International Union of North America, Local 506 (Applicant) v. Northland Properties Corporation, Vandalay Contracting Inc. (Respondents); Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Northland Properties Corporation/Northland Properties Corporation 2002 and/or, Vandalay Contracting Inc. (Respondents)

0134-07-R: Labourers' International Union of North America, Ontario Provincial District Council (OPDC) (Applicant) v. Remco Concreting also operating as Remco Limited 1230991 Ont. Ltd Remco Concreting Limited (Respondent)

0462-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Monserco Limited (Respondent)

1133-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Northwood Construction Corporation (Respondent)

1450-07-R: Service Employees International Union Local 1.on (Applicant) v. NSI Nutra Services Inc. (Respondent) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Intervener)

1465-07-R: Canadian Construction Workers' Union (Applicant) v. Gold Leaf Homes Inc.
(Respondent) v. Universal Workers Union, Labourers International Union of North America, Local 183 (Intervener)

1760-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. C.S. Bachly Builders Limited, Bachly Construction (Respondents)

2047-07-R: International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local 765 (Applicant) v. B & B Mechanical (Respondent)

2520-07-R: United Brotherhood of Carpenters and Joiners of America, Local 1916 (Applicant) v. Black and McDonald Limited (Respondent) v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Intervener)

2858-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tower Contracting Ltd., Tower Restoration Ltd. (Respondents)

3585-07-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Ontario Lottery and Gaming Corporation (Respondent)

3737-07-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853 - Sprinkler Fitters of Ontario (Applicant) v. Tyco International of Canada Ltd. c.o.b. SimplexGrinnell (Respondent)

3803-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood Of Carpenters And Joiners Of America (Applicant) v. Emerald Roofing (Respondent)
3864-07-R: Service Employees International Union Local 1 Canada (Applicant) v. Abbeylawn Manor Retirement Home (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1148-05-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Rorison Industrial Electric Limited and/or, Hadrian Excavating Inc. and/or, Hadrian Excavating Limited (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 625 (Intervener) *(Withdrawn)*

1193-06-R: The International Union of Painters and Allied Trades, Local 1891 (Applicant) v. 859747 Ontario Inc. o/a Dover Interiors and against, Brian Vecero and Fern Legault o/a Bluestone Construction and/or, Bluestone Drywall (Respondents) v. Construction Workers, Local #6 Affiliated with Christian Labour Association of Canada (Intervener) *(Withdrawn)*

3293-06-R: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers and its Local 2041 (Applicant) v. Partitions G.F. Inc., Partitions G.F. Systemes Interieurs Inc., Groupe Filippin Inc., Les Gestions Gifi Inc. and, Figi Construction Montreal Inc. (Respondents) *(Withdrawn)*

4137-06-R: Ontario Council of the International Union of Painters and Allied Trades and International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Roncali Brothers Limited, Presot Painting and Drywall Ltd., 1545885 Ontario Inc. c.o.b. as UMG, Presot Muccini Urban Management Group Inc. c.o.b. as UMG (Respondents) *(Withdrawn)*

0504-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. AMEC NNC Canada Limited, AMEC NCL Canada Limited, Monserco Ltd. and, Nuclear Safety Solutions Limited (Respondents) *(Withdrawn)*

0914-07-R: Service Employees International Union, Local 1.ON (Applicant) v. Hellenic Home for the Aged Inc., Sodexho MS Canada Limited (Respondents) v. Canadian Union of Public Employees and its Locals 4829 and 4830 (Intervener) *(Withdrawn)*

2702-07-R: The International Brotherhood of Painters and Allied Trades, Local Union 557 (Applicant) v. C.I.R. Painting & Industrial Coatings Ltd., Regency Painting Inc. (Respondents) *(Withdrawn)*

3361-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tower Restoration Ltd., Tower Contracting Ltd. (Respondents) *(Withdrawn)*

SALE OF A BUSINESS

1148-05-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Rorison Industrial Electric Limited and/or, Hadrian Excavating Inc. and/or, Hadrian Excavating Limited (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 625 (Intervener) *(Withdrawn)*

1193-06-R: The International Union of Painters and Allied Trades, Local 1891 (Applicant) v. 859747 Ontario Inc. o/a Dover Interiors and against, Brian Vecero and Fern Legault o/a Bluestone Construction and/or, Bluestone Drywall (Respondents) v. Construction Workers, Local #6 Affiliated with Christian Labour Association of Canada (Intervener) *(Withdrawn)*

3293-06-R: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers and its Local 2041 (Applicant) v. Partitions G.F. Inc., Partitions G.F. Systemes Interieurs Inc., Groupe Filippin Inc., Les Gestions Gifi Inc. and, Figi Construction Montreal Inc. (Respondents) *(Withdrawn)*

4137-06-R: Ontario Council of the International Union of Painters and Allied Trades and International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Roncali Brothers Limited, Presot Painting and Drywall Ltd., 1545885 Ontario Inc. c.o.b. as UMG, Presot Muccini Urban Management Group Inc. c.o.b. as UMG (Respondents) *(Withdrawn)*

2702-07-R: The International Brotherhood of Painters and Allied Trades, Local Union 557 (Applicant) v. C.I.R. Painting & Industrial Coatings Ltd., Regency Painting Inc. (Respondents) *(Withdrawn)*

3006-07-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. P. Krytiuk & Assoc. Ltd., Peter Krytiuk c.o.b. as Blaze Protect (Respondents) *(Granted)*

3442-07-R: Service Employees International Union Local 2.on, Brewery, General and Professional Workers Union (Applicant) v. Serco Facilities Management Inc. and, City of Ottawa (Respondents) v. Ottawa-Carleton Public Employees Union, Local 503 (Intervener) *(Withdrawn)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3011-07-R: Richard Mackenzie (Applicant) v. Construction Workers Local 53, Christian Labour Association of Canada (CLAC) (Respondent) v. Elric Contractors of Wallaceburg Limited (Intervener) *(Withdrawn)*

Unit: "all construction labourers, carpenters and carpenters' apprentices in the employ of Elric Contractors Wallaceburg Limited in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit)

3429-07-R: Les Serran (Applicant) v. International Union of Operating Engineers Local 772 (Respondent) v. Newalta Industrial Services Inc. (Intervener) *(Granted)*

Unit: "all employees of PSC Industrial Services Canada Inc. (now of Newalta Industrial Services Inc.) at its plant at Fort Erie save and except supervisors and those above the rank of supervisor and office personnel" (9 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	8
Number of ballots segregated and not counted	0

3626-07-R: Tim Orpel (Applicant) v. Communications, Energy and Paperworkers Union of Canada, 102-0-22 (Respondent) v. Spicers, a Division of PaperlinX Canada Ltd. (Intervener) *(Granted)*

Unit: "all employees of the Cascades Resources Division of The Cascades Fine Papers Group Inc. employed in the City of Ottawa, save and except Managers, persons above the rank of Manager, Resource Centre Supervisor, Sales Representatives, Customer Service Representatives, and office and clerical employees" (14 employees in unit)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	11
Number of ballots segregated and not counted	0

3640-07-R: Employees of Magical Nook, CPTM (Applicant) v. The United Food and Commercial Workers Union of Canada, Local 175 (Respondent) *(Dismissed)*

3649-07-R: George Bobojchov (Applicant) v. United Steelworkers, Local 9042 (Respondent) v. Nilfisk-Advance Canada Company (Intervener) *(Granted)*

Unit: "The Company recognizes the Union as the sole and exclusive bargaining agent for all its employees at the City of Mississauga, Ontario, save and except foreman, persons above the rank of foreman, office and sales staff." (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2
Number of ballots segregated and not counted	0

3693-07-R: Julia Smith (Applicant) v. CUPE 4724.01 (Respondent) v. The Ajax Pickering Women's Centre Inc./Herizon House (Intervener) *(Dismissed)*

Unit: "all employees of Ajax Pickering Women's Shelter Inc. Herizon House employed in the City of Ajax, save and except supervisors and coordinator, persons above the rank of supervisor and coordinator and office and clerical staff" (21 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	11
Number of ballots marked against respondent	9
Number of ballots segregated and not counted	0

3814-07-R: Howard Harris (Applicant) v. United Food and Commercial Workers International Union, Local 459 (Respondent) v. Omstead Foods Limited (Intervener) *(Withdrawn)*

REFERRAL FROM MINISTER (SECTION 115 FORMERLY SECT 109)

3603-07-M: Construction Workers Local 53, Christian Labour Association of Canada (CLAC) (Applicant) v. Elric Contractors of Wallaceburg Limited (Respondent) *(Withdrawn)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1380-03-U; 1634-03-U: The International Union of Painters and Allied Trades, Local 1891 (Applicant) v. 859747 Ontario Inc. o/a Dover Interiors (Respondent); 859747 Ontario Inc. c.o.b. as DOVER INTERIORS (Applicant) v. International Union of Painters and Allied Trades, Local 1891 (Respondent) *(Dismissed)*

2541-04-U: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. 1229912 Ontario Limited c.o.b. as ASL Alpine Sodding & Landscaping Limited and/or Alpine Sodding Co. (Toronto) Limited and/or A.S.L. (Respondent) *(Withdrawn)*

3822-06-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. MDS Inc. (Respondent) *(Withdrawn)*

3933-06-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Annan and Bird Lithographers Inc. (Respondent) *(Withdrawn)*

4077-06-U: Thomas Deehan, Gary McCartney, Jeffrey English, Donald (Scott) Prosser, Michael Higgins, William Andrusyshyn, Joel Taggart, Richard Barlett, Jamie Zions, Andrew Gates, Shaughn Butler, David Rosebrugh, Tony D'Abramo, and Jeffrey Superka (Applicant) v. The Communications, Energy and Paperworkers Union, Local 975 (Respondent) *(Dismissed)*

0345-07-U: George Nedelkoff (Applicant) v. Carpenters and Allied Workers, Local 27 United Brotherhood of Carpenters and Joiners of America (Respondent) v. Aluma Systems Inc. (Intervener) *(Dismissed)*

0347-07-U: Kenny Chisholm (Applicant) v. Toronto Civic Employees Union (Local 416 – Canadian Union of Public Employees) (Respondent) v. City of Toronto (Intervener) *(Dismissed)*

0512-07-U: Labourers' International Union of North America, Local 1089 (Applicant) v. Remco Concreting o/a Remco Limited 1230991 Ont. Ltd Remco Concreting Limited (Respondent) *(Withdrawn)*

1259-07-U: Marion Jean Siddle (Applicant) v. National Automobile, Transportation and General Workers Union of Canada (CAW-Canada) (Respondent) v. DaimlerChrysler Canada Inc. (Intervener) *(Dismissed)*

1350-07-U: Ontario Nurses' Association (Applicant) v. Canadian Blood Services, National Contact Centre (Respondent) *(Withdrawn)*

1598-07-U: Laurel Palmer (Applicant) v. Elementary Teachers' Federation of Ontario and Elementary Teachers' Federation of Ontario - York Region (Respondent) *(Withdrawn)*

1739-07-U: Andrea Lynn Nieuwland (Applicant) v. Ontario Secondary School Teachers' Federation (Respondent) v. Near North District School Board (Intervener) *(Withdrawn)*

1893-07-U: Chris-Ann Bradshaw (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Complex Services Inc. (Intervener) *(Dismissed)*

2166-07-U: Harry Fuller (Applicant) v. Canadian Union of Public Employees, Local 79 (Respondent) v. City of Toronto (Intervener) *(Withdrawn)*

2176-07-U: Canadian Union of Public Employees (Applicant) v. Tamir Foundation (Respondent) *(Withdrawn)*

2420-07-U: Trevor J. Lumley (Applicant) v. Northern Employees Association (Respondent) v. 955140 Ontario Inc. o/a Pickard Construction (1991) (Intervener) *(Withdrawn)*

2572-07-U: Steve Kirby (Applicant) v. Ontario Public Service Employees Union (OPSEU) (Respondent) v. Niagara Casinos/Complex Services Inc. (Intervener) *(Terminated)*

2574-07-U: Steve Rysinski (Applicant) v. International Brotherhood of Electrical Workers, Local 804 (Respondent) v. Aecon Industrial, A Division of Aecon Construction Group Inc. (Intervener) *(Dismissed)*

2653-07-U: Canadian Union of Public Employees and its Local 503 (Applicant) v. City of Ottawa (Respondent) *(Withdrawn)*

2763-07-U; 2764-07-U: Piara Singh Saini (Applicant) v. CAW Local 40 (Respondent); Waryam Singh (Applicant) v. CAW Local 40 (Respondent) *(Dismissed)*

2781-07-U: Carol Veecock-Little (Applicant) v. Canadian Union of Public Employees, Local 79 (Respondent) v. City of Toronto (Intervener) *(Dismissed)*

2784-07-U: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Peel Condominium Corporation No. 112 (Respondent) *(Withdrawn)*

2894-07-U: Dion Gill (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 1072 (Respondent) v. Masonite International Corporation (Intervener) *(Withdrawn)*

2925-07-U: Lincoln Sterling (Applicant) v. UNITE HERE Ontario Council and UNITE HERE Local 152 (Respondent) v. Winners Merchants Int. (Intervener) *(Dismissed)*

3056-07-U: Canadian Union of Public Employees Local 4400 (Applicant) v. McMurrich Sprouts Daycare (Respondent) *(Withdrawn)*

3109-07-U: International Union of Operating Engineers, Local 793 (Applicant) v. JBL Construction, (A Division of 1644472 Ontario Limited) (Respondent) *(Withdrawn)*

3111-07-U: Ivan Cusnir (Applicant) v. United Food and Commercial Workers Canada, Local 1000A (Respondent) v. Associated Brands (Intervener) *(Dismissed)*

3122-07-U: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. PXL Cross Linked Foam Corp. (Respondent) *(Withdrawn)*

3125-07-U: Aristide Tremo (Applicant) v. Canadian Union of Public Employees and its Local 3903 (Respondent) *(Dismissed)*

3131-07-U: Canadian Union of Public Employees and its Local 3703 (Applicant) v. Rideau Place Retirement Residence (Chartwell Seniors Housing) (Respondent) *(Withdrawn)*

3171-07-U: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tower Contracting Ltd., Tower Restoration Ltd. (Respondents) *(Withdrawn)*

3175-07-U: Steve Zarich (Applicant) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Respondent) *(Dismissed)*

3266-07-U: Steven George Clapdorp (Applicant) v. CAW-Canada, Local 222 (Respondent) v. Lear Corporation (Intervener) *(Withdrawn)*

3316-07-U: International Association of Machinists and Aerospace Workers (Applicant) v. Excel Technologies Limited (Respondent) *(Withdrawn)*

3413-07-U: Emy Bonnici (Applicant) v. UFCW Canada Local 1000A (Respondent) *(Withdrawn)*

3677-07-U: Canadian Union of Public Employees and its Local 2484 (Applicant) v. Ideal Child Services Group (Respondent) *(Withdrawn)*

APPLICATION FOR INTERIM ORDER

3642-07-M; 3730-07-M: Service Employees International Union, Local 1.on (Applicant) v. Lord Lansdowne Retirement Residence (Respondent) *(Withdrawn)*

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3581-07-M: National Corporate Housekeeping Services Inc. (Applicant) v. Retail Wholesale and Department Store Union, District Council of the United Food and Commercial Workers International Union (Respondent) *(Granted)*

TRUSTEESHIP

0955-07-T: Brick and Allied Craft Union of Canada (Applicant) v. Marble, Tile & Terrazzo, Local 31 Ontario of The Brick and Allied Craft Union of Canada (Respondent) *(Granted)*

JURISDICTIONAL DISPUTES

1590-07-JD: International Association of Bridge, Structural, Ornamental and Reinforing Iron Workers, Local 759 (Applicant) v. Lockerbie & Hole Inc. and, Millwrights Local Union 1151 (Respondents) *(Granted)*

2638-07-JD: International Union of Painters and Allied Trades, Local 200 (Applicant) v. Ellis-Don Corporation, Transit Glass & Aluminum Ltd., International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Respondents) v. Architectural Glass & Metal Contractors Association (Intervener) *(Withdrawn)*

2662-07-JD: International Union of Painters and Allied Trades, Local 114 (Applicant) v. EllisDon Design Build Inc., Westmount Storefront Systems, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Respondents) v. Architectural Glass & Metal Contractors Association (Intervener) *(Withdrawn)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1342-07-OH: Carey Crumb (Applicant) v. MultiServ (Harsco) (Respondent) *(Dismissed)*

2053-07-OH: Glenn M. Fleger (Applicant) v. Simcoe Block (1979) Limited and Janet Readman (Respondent) *(Withdrawn)*

2996-07-OH: William E. Laurence (Applicant) v. Express Personnel Services, Orlick Industries Limited (Respondents) *(Withdrawn)*

3079-07-OH: Michael-John Knoblauch Shawn Marc Amerlinck (Applicant) v. Brighton Court Apartments c/o Realstar Management (Respondent) *(Withdrawn)*

3234-07-OH: Walter Hasselaar (Applicant) v. Fabtek Welding (Respondent) *(Withdrawn)*

3406-07-OH: Shawn Gauthier (Applicant) v. Morin Bros. Inc. (Respondent) *(Dismissed)*

CONSTRUCTION INDUSTRY GRIEVANCES

1147-05-G: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Rorison Industrial Electric Limited and/or, Hadrian Excavating Inc. and/or, Hadrian Excavating Limited (Respondents) *(Withdrawn)*

3137-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Ellis Don Corporation (Respondent) *(Endorsed Settlement)*

2105-07-G: Labourers' International Union of North America, Local 506 (Applicant) v. Sterling Concrete Sawing & Drilling (Respondent) *(Withdrawn)*

2267-07-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Applicant) v. Ellis Don Corporation (Respondent) *(Withdrawn)*

2268-07-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Applicant) v. Ellis Don Corporation (Respondent) *(Withdrawn)*

2703-07-G: The International Brotherhood of Painters and Allied Trades, Local Union 557 (Applicant) v. C.I.R. Painting & Industrial Coatings Ltd., Regency Painting Inc. (Respondents) *(Withdrawn)*

3045-07-G: Construction Workers Local 53, affiliated with Christian Labour Association of Canada (CLAC) (Applicant) v. Elric Contractors Wallaceburg Limited (Respondent) *(Withdrawn)*

3225-07-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. 1051731 Ontario Limited (Respondent) *(Withdrawn)*

3395-07-G: Brick and Allied Craft Union of Canada, Local 31 (Applicant) v. Urban Solutions (Respondent) *(Granted)*

3523-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. Econo Excavating & Paving (1991) Co. Ltd. (Respondent) *(Granted)*

3524-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. Wasero Construction (1991) Ltd. (Respondent) *(Granted)*

3550-07-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Visions General Maintenance & Construction Services Inc. and, Mr. Frank Principe (Respondents) *(Endorsed Settlement)*

3554-07-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rocan Construction Ltd. and Ms. Janine Campbell (Respondent) *(Endorsed Settlement)*

3556-07-G: Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Bruce Power LP (Respondent) *(Withdrawn)*

3563-07-G: U.A. Local 853 Sprinkler Fitters of Ontario (Applicant) v. Depend-All Fire Systems Inc. (Respondent) *(Endorsed Settlement)*

3567-07-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. An-Dell Electric Limited (Respondent) *(Granted)*

3575-07-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Kevin Dickie Electric Inc. (Respondent) *(Granted)*

3591-07-G; 3606-07-G; 3632-07-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. AXA Electric Inc. (Respondent); International Brotherhood of Electrical Workers, Local 894 (Applicant) v. AXA Electric Inc. (Respondent); International Brotherhood of Electrical Workers, Local 353 (Applicant) v. AXA Electric Inc. (Respondent) *(Endorsed Settlement)*

3627-07-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Ducan Ceiling & Walls Systems of Oshawa Limited (Respondent) *(Granted)*

3629-07-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. 2108703 Ontario Inc. c.o.b. as Onsite Contractors (Respondent) *(Granted)*

3690-07-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local Union 93 (Applicant) v. O'Leary's Limited (Respondent) *(Granted)*

3696-07-G: Labourers' International Union of North America, Local 625 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Intrepid General Limited (Respondent) *(Terminated)*

3706-07-G: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. Oakdale Drywall and Acoustics Ltd. and, Oakdale Drywall and Acoustics Inc. (Respondents) *(Withdrawn)*

3707-07-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. Clegg Glass Limited (Respondent) *(Dismissed)*

3713-07-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. 1430986 Ontario Inc. c.o.b. Roper Controls (Respondent) *(Granted)*

3728-07-G: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Margold Contractors Ltd. (Respondent) *(Granted)*

3733-07-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. La Vitesse Drywall & Taping (Respondent) *(Granted)*

3746-07-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. El Decor Ltd. (Respondent) *(Granted)*

3747-07-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Barry Alexander Riddell c.o.b. as Riddell Contracting (Respondent) *(Granted)*

3757-07-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Crossby Dewar Projects Inc. (Respondent) *(Withdrawn)*

3765-07-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853 - Sprinkler Fitters of Ontario (Applicant) v. David Alexander Wood c.o.b. as Niagara 1st Sprinkler & Fire Protection (Respondent) *(Granted)*

3777-07-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Aggressive Metals Inc. (Respondent) *(Granted)*

3816-07-G: International Union of Bricklayers and Allied Craftworkers, Local 7 (Applicant) v. Presto Construction Inc. (Respondent) *(Withdrawn)*

APPEALS - EMPLOYMENT STANDARDS ACT

2713-02-ES: Sunset Inn (Applicant) v. Juliana Jacques and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0837-04-ES: Michael Roy Moniz (Applicant) v. Atlas Taxi Service Ltd., George Papadakos and, Director of Employment Standards (Respondents) *(Dismissed)*

0906-05-ES: Cheryl Hickox o/a Gone With The Dogs (Applicant) v. Brianne Bessie, Erin Fogg (Jayne Schmid), Amber Mitchell, and, Director of Employment Standards (Respondents) *(Withdrawn)*

1590-05-ES: George McDonald, a Director of Miller's Country Fare Restaurants Limited (Applicant) v. Augustin N'Com, Zachary Erskine, Mary Titus, Emma Willmott and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1739-06-ES: EnviroServe Inc. (Applicant) v. George Malek and, Director of Employment Standards (Respondents) *(Terminated)*

0734-07-ES: Celeste Kivilichan Management (Applicant) v. Elizabeth Pretty, Director of Employment Standards (Respondents) *(Dismissed)*

0829-07-ES: Christopher Pola (Applicant) v. 853998 Ontario Inc. carrying on business as B & B Express and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0929-07-ES: Micheal Sernoski (Applicant) v. Farm Boy Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

1089-07-ES: Pen Hair Limited (o/a Barber's Chair) (Applicant) v. Charlotte Thompson and, Director of Employment Standards (Respondents) *(Terminated)*

1118-07-ES: Brian Latendresse (Applicant) v. JLB Fabricating Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1188-07-ES: Baycairn Training Centre and PBR Systems Group (Applicant) v. Victor Arlidge, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1220-07-ES: 2029449 Ontario Inc. o/a Monaco Club Design (Applicant) v. Volodymyr Buncha and, Director of Employment Standards (Respondents) *(Terminated)*

1311-07-ES: Gerald O'Neill (Applicant) v. J. G. Stewart Construction Ltd., and, Director of Employment Standards (Respondents) *(Terminated)*

1406-07-ES: Trade Tech Industries (Applicant) v. Jamie McWilliams and, Director of Employment Standards (Respondents) *(Dismissed)*

1454-07-ES: Campbell Company of Canada (Applicant) v. William Hoggarth and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1836-07-ES: Roland Berger, a director of Heritage Properties Development Inc. (Applicant) v. Gregory Geier, Gordon Geier, John Hayward, Andrew Leyland, Brian Taylor, Ryan Wilson, Krista Woof and, Director of Employment Standards (Respondents) *(Dismissed)*

1848-07-ES: Graham Brothers North Inc. o/a Bankside Cafe Bar & Billiards (Applicant) v. Shirley Boucher and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1849-07-ES: 329985 Ontario Limited o/a Kisko Products (Applicant) v. Marvon Seetal and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1942-07-ES: Sergei Smirnov (Applicant) v. Samuel Property Management Ltd. cob as York Condominium Corporation, Director of Employment Standards (Respondents) *(Granted)*

2062-07-ES: 1512081 Ontario Limited (Applicant) v. James Bailey, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2080-07-ES: Niagara 21st Group Inc. o/a Marriott Niagara Falls, Fallsview Hotel & Spa (Applicant) v. Domenic Gilberti and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2117-07-ES: Blair Davis (Applicant) v. Farmbro Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2156-07-ES: Grimsby Custom Tooling Limited (Applicant) v. Richard Guenther, Director of Employment Standards (Respondents) *(Dismissed)*

2161-07-ES: Daniel Simpson (Applicant) v. Intelligarde International Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2188-07-ES: Esther Juele (Applicant) v. Susan Lokash Bloom and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2282-07-ES: Zack Steel (Applicant) v. Vamos a Canada Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2317-07-ES: Ravindra Patel (Applicant) v. Welsh Industrial Manufacturing Inc. and, Director of Employment Standards (Respondents) *(Granted)*

2320-07-ES: Tom Kase Merchandisers Ltd./Canadian Tire (Applicant) v. Travis Hilts and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2344-07-ES: Cheryl Marsh (Applicant) v. Skylift Rentals, Director of Employment Standards (Respondents) *(Withdrawn)*

2366-07-ES: Donald Poole (Applicant) v. Ajax Jeep Eagle Ltd. operating as Menzies Chrysler and , Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2403-07-ES: Edmund Berscheid on behalf of 1389384 Ontario Inc. cob Mount Nemo Restaurant (Applicant) v. Siegfried Lizon and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2522-07-ES: Yashumati Mistry (Applicant) v. CableServ Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2581-07-ES: Lily Kadoch (Applicant) v. 922837 Ontario Ltd. o/a Print Three Richmond-Adelaide Centre and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2646-07-ES: 1310913 Ontario Ltd. carrying on business as Motimahal Indian Cuisine & Banquet (Applicant) v. Surya Bahadur Panta Chhetri and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2731-07-ES: Robert Bird o/a County Auto Repair and Radiator Service (Applicant) v. Kory Gill and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2754-07-ES: Phoenix Quality Inspections Inc. (Applicant) v. Katlin Flieler, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2788-07-ES: Sarah Hughes (Applicant) v. Mindtech Academic Schools Inc. o/a Mindtech Montessori Schools, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2833-07-ES: 1431157 Ontario Inc o/a Rai Carrier (Applicant) v. Jaswant Gill and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2846-07-ES: Pickering Volkswagen Inc. (Applicant) v. Cara Belbin and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2849-07-ES: Driver and Vehicle License Issuing Office #110 (Applicant) v. Lisa Rozborowskyj and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2850-07-ES: Driver and Vehicle License Issuing Office #110 (Applicant) v. Tricia Patterson and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2865-07-ES: Andrew Gray, a Director of 2050004 Ontario Inc. o/a Fez Batik (Applicant) v. David Maloney and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2887-07-ES: Protreadz Inc. (Applicant) v. Derrick Hibbs, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2928-07-ES: Dave Jarvis (Applicant) v. Stewart Wood Transport Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2974-07-ES: John Joseph Riseboro (Applicant) v. Barrie Concrete Forming, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3035-07-ES: Mount St. Louis Moonstone Ski Resort Ltd (Applicant) v. Shannon Legault, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3043-07-ES: Contractor.com Ltd. (Applicant) v. Igor Hamer and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3060-07-ES: Adam Champagne (Applicant) v. Cascade Canada, and, Director of Employment Standards (Respondents) *(Withdrawn)*

3084-07-ES: Kwane Tawiah (Applicant) v. Profile Industries Limited and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3097-07-ES: Dianna Farrugia and Geoffrey Farrugia (Applicant) v. Carmelita Silorio and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3121-07-ES: Private Pleasures (Applicant) v. Rebecca Kekes and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3126-07-ES: Christine Lawson (Applicant) v. Canadian Mental Health Association Hamilton Branch and, Director of Employment Standards (Respondents) *(Terminated)*

3129-07-ES: Ananda Tissa Weerasekera (Applicant) v. Premier Fitness and Mademoiselle Spa & Women's Fitness Clubs and, Director of Employment Standards (Respondents) *(Withdrawn)*

3134-07-ES: Beverley Hepburn (Applicant) v. Dr. Stuart Z. Dyment and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3142-07-ES: Canteen of Canada Ltd. (Applicant) v. Paul Trenwith, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3143-07-ES: Neworldance Academy (Applicant) v. Elizabeth Varty, Director of Employment Standards (Respondents) *(Terminated)*

3191-07-ES: Pickering/Ajax Truck Centre Inc. (Applicant) v. Daniel Feeney and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3243-07-ES: Michelle L. Field, a director of Aircraft Interiors Inc. (Applicant) v. Ron Barnes and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3248-07-ES: Guelph Tool Inc. (Applicant) v. Estate of Ronald Nash, Sharon Nash (Trustee), Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3249-07-ES: Christopher J. Field, a director of Aircraft Interiors Inc. (Applicant) v. Ron Barnes and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3314-07-ES: 6353193 Canada Incorporated o/a Subway Restaurants (Applicant) v. Aamir Sawar, and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3335-07-ES: Running Room Ltd. a Div. of Running Room Canada Inc. & Running Room Sports Inc. o/a Walking Room (Applicant) v. Aimee Howlett and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3368-07-ES: John H Kruithof (Applicant) v. Kawartha Dairy Ltd., Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3369-07-ES: 1417696 Ontario Limited (Applicant) v. Peter Gunkel and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3423-07-ES: Penguin Petroleum Products Ltd. (Applicant) v. Tammy Capewell and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3452-07-ES: Bradley Rabins (Applicant) v. Shower Doors International Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3453-07-ES: Marion Nirschl (Applicant) v. Beauty by Nature Inc. and, Director of Employment Standards (Respondents) *(Terminated)*

3469-07-ES: Ryan Nap (Applicant) v. Finelli Cabinets Limited and, Director of Employment Standards (Respondents) *(Terminated)*

3470-07-ES: Christine Olubiek (Applicant) v. Canadian Athletes Now Fund (CAN Fund), Director of Employment Standards (Respondents) *(Dismissed)*

3480-07-ES: Equinox Centre for Natural Health (Applicant) v. Ninette Correa, Megan Cole, Donna Wagner-Higgins, Catherine Black, and, Director of Employment Standards (Respondents) *(Dismissed)*

3533-07-ES: Rita DiMambro (Applicant) v. Eimskip Atlas Canada, Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3565-07-ES: Maria Moreira (Applicant) v. 2035720 Ontario Inc. o/a Premier Fitness and, Director of Employment Standards (Respondents) *(Dismissed)*

3593-07-ES: 6285023 Canada Limited c.o.b. as Flashpoint Productions (Applicant) v. Sean McAuley and, Director of Employment Standards (Respondents) *(Dismissed)*

3655-07-ES: Ron Krochuk, a Director of Outback Installations Inc. (Applicant) v. Tracy Baxter, Steve Harrop, Anthony Segato and, Director of Employment Standards (Respondents) *(Dismissed)*

3691-07-ES: Brian H. Smyth (Applicant) v. Sameday Roofing Systems Inc. o/a Sameday Roofing Systems and, Director of Employment Standards (Respondents) *(Terminated)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

2861-05-HS: United Food and Commercial Workers International Union, Local 175 & 633 (Applicant) v. Maplewood Long Term Care Residence and, William Gubbels, Inspector (Respondents) *(Withdrawn)*

3205-06-HS: O-1 Canada Corp. (Applicant) v. CAW, Local 29 and, Joe Zaher, Inspector (Respondents) *(Withdrawn)*

REFERRAL FROM MINISTER (SEC. 3(2)) HLDA

3177-07-M: Christian Labour Association of Canada (Applicant) v. 1249796 Ontario Inc. c.o.b. as Chatham Retirement Resort (Respondent) *(Granted)*

APPLICATIONS FOR ACCREDITATION

0848-07-R: The Ontario Formwork Association (Applicant) v. The Formwork Council of Ontario (Respondent) *(Granted)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1567-05-ES; 1568-05-ES: Mark Roberts (Applicant) v. Crown Industrial Roofing, and, Director of Employment Standards (Respondents); Mark Roberts (Applicant) v. Clarica Life Insurance, and, Director of Employment Standards (Respondents) *(Dismissed)*

2640-06-U: Gerarda Fournier (Applicant) v. CAW, Local 1285 (Respondent) v. DaimlerChrysler Canada Inc. (Intervener) *(Dismissed)*

3781-06-ES: Mobinur Alam (Applicant) v. Monte Cristo Restaurant & Piano Bar, Director of Employment Standards (Respondents) *(Dismissed)*

4045-06-U; 4155-06-U; 4156-06-U; 4157-06-U; 4158-06-U; 0467-07-U: Peter A. Khaiter (Applicant) v. York University Faculty Association (YUFA) (Respondent) v. York University (Intervener) *(Dismissed)*

4148-06-ES: Mark Roberts (Applicant) v. Prime Forestry Canada Inc., and, Director of Employment Standards (Respondents) *(Granted)*

0347-07-U: Kenny Chisholm (Applicant) v. Toronto Civic Employees Union (Local 416 – Canadian Union of Public Employees) (Respondent) v. City of Toronto (Intervener) *(Dismissed)*

0848-07-R: The Ontario Formwork Association (Applicant) v. The Formwork Council of Ontario (Respondent) *(Granted)*

1198-07-U: Duayne Brady (Applicant) v. Teamsters Local Union 938 (Respondent) v. T.S.T. Automotive Services Division (Intervener) *(Dismissed)*

1532-07-OH: Dengru Wu (Applicant) v. The Corporation of the City of Cambridge (Respondent) *(Dismissed)*

3038-07-U: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. 1594313 Ontario Ltd. o/a SB Electrical Services (Respondent) *(Dismissed)*

Ontario Labour Relations Board,
505 University Avenue,
Toronto, Ontario
M5G 2P1

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